

2724

No. 13215

United States  
 Court of Appeals  
 for the Ninth Circuit

ALBERT A. MAYER and R. D. TEMBREULL,  
 Appellants,

vs.

WILLIAM J. STEINERT, Trustee in Bankruptcy  
 of McHugh Trucking Company, a limited  
 partnership, and James E. McHugh, General  
 Partner, bankrupt,

Appellee.

Transcript of Record

Appeal from the United States District Court  
 for the Western District of Washington,  
 Northern Division

FILED

MAR 24 1952



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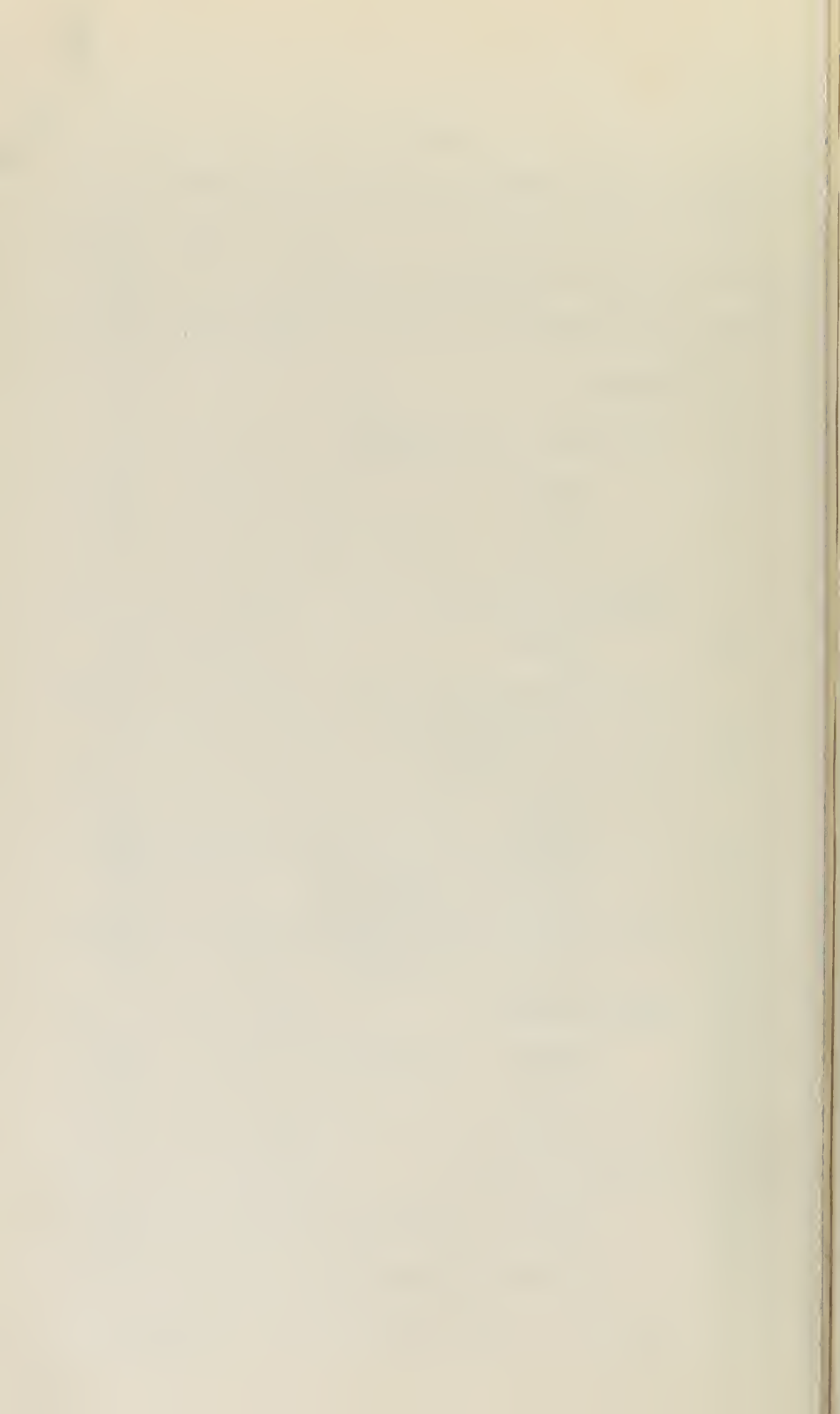
[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

J. LAEL SIMMONS,

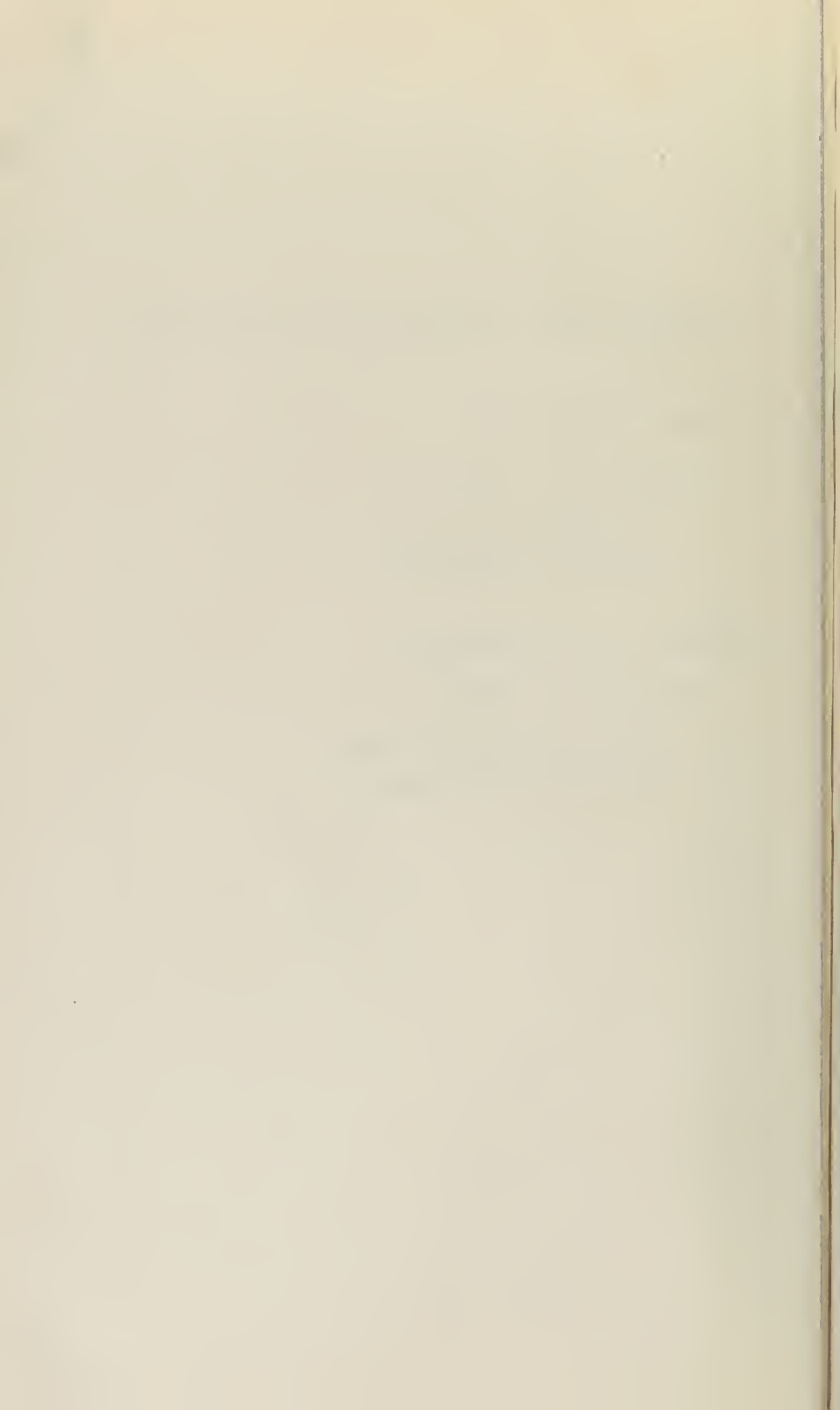
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Northern Life Tower,  
Seattle 1, Washington.

NELSON R. ANDERSON,

Attorney for Appellee,

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Seattle 1, Washington.



In the District Court of the United States for the  
Western District of Washington, Northern  
Division

In Bankruptcy—No. 38376

In the Matter of

McHUGH TRUCKING COMPANY, a limited  
partnership, and JAMES E. McHUGH, Gen-  
eral Partner,

Alleged Bankrupt.

### CREDITORS' PETITION

To the Honorable Lloyd L. Black, Judge of the  
District Court of the United States for the  
Western District of Washington, Northern  
Division:

The petition of Albert Mayer of 626 13th Ave-  
nue, North, Seattle, Washington, and R. D. Tam-  
bruell of 626 13th Avenue North, Seattle, Wash-  
ington, and J. Lael Simmons, 1501 Northern Life  
Tower, Seattle, Washington, respectfully repre-  
sents:

#### I.

That McHugh Trucking Company is a limited  
partnership with its principal place of business at  
Seattle, Washington, for the larger portion of six  
months immediately preceding the filing of this  
petition in the above judicial district. That a copy  
of its certificate of partnership is hereto attached  
marked Exhibit A and by reference included in  
this petition.

## II.

That said partnership is engaged in the general freighting, hauling and trucking business.

## III.

That said partnership owes debts in excess of \$1,000.00. That it has creditors in excess of twelve (12) in number, that the exact amount of its indebtedness and the names and addresses of its creditors are not presently known to petitioners but that your petitioners have provable claims against said partnership.

## IV.

That the provable claims of your petitioners, fixed as to liability and liquidated in amount, aggregate in excess of the value of securities held by them, more than \$500.00. The nature and amount of your petitioners claims are as follows:

J. Lael Simmons: Professional services

and cash .....\$ 568.80

Albert Mayer Cash loaned..... 11,611.19

R. D. Tembreull Cash loaned..... 11,611.19

## V.

That said partnership is insolvent and unable to pay its debts in the ordinary course of business or at all and within four months next preceding the filing of this petition has committed an act of bankruptcy in that on September 30, 1949, or thereabouts, it did cause to be paid to the order of E. B. Harold the sum of \$400.00 for the private account of the general partner, James E. McHugh. That the transfer of said funds was during insolvency and

while said general partner was overdrawn on his account with the partnership and constitutes a preference as to other creditors including your petitioners.

## VI.

That within four months next preceding the filing of this petition the said general partner and the partnership have committed further acts of bankruptcy in that the National Bank of Commerce of Seattle, Washington, has, through legal proceedings, obtained the equity of the partnership in and to certain personal property consisting of a 1948 Federal Truck and Tractor, Model 45M, Motor No. T-6427-2336, Serial No. 145965, and a Thomas low bed trailer, Serial No. 1070, and that the foreclosure on the said equipment constitutes a preference as to said creditors as may be more fully ascertained from the records and files of Yakima County, Washington, Superior Court Cause No. 36046.

Wherefore, your petitioners pray that service of this petition, with a subpoena, may be made upon said McHugh Trucking Company, a limited partnership, and James E. McHugh, general partner, as provided in the Act of Congress relating to bankruptcy, and that said partnership and said general partner be adjudged to be a bankrupt within the purview of said Act.

/s/ J. LAEL SIMMONS,

/s/ ALBERT MAYER,

/s/ R. D. TEMBREULL.

State of Washington,  
County of King—ss.

J. Lael Simmons, Albert Mayer and R. D. Tembreull, being first duly sworn on oath, each for himself, depose and say: That I am one of the petitioners herein, that I have read the foregoing Petition, and know the contents thereof and believe the same to be true.

/s/ J. LAEL SIMMONS,

/s/ ALBERT MAYER,

/s/ R. D. TEMBRUELL.

Subscribed and Sworn to before me this 20th day of January, 1950.

[Seal] /s/ RICHARD G. McCANN,  
Notary Public in and for the State of Washington,  
residing at Seattle.

## EXHIBIT A

### CERTIFICATE OF LIMITED PARTNERSHIP

Know All Men By These Presents: That James McHugh, Albert Mayer and R. D. Tembreull, being desirous of forming a limited partnership have associated themselves together in the following manner and upon being first duly sworn on oath do hereby certify, swear and state:

#### I.

That the name of the limited partnership shall be McHugh Trucking Co.

II.

That the purpose and character of said business shall be the operation of a general dealership, trucking, hauling and freighting business and to do all things incidental and consequential to carrying on said business.

III.

That the location of the principal place of business shall be Seattle, Washington.

IV.

That the name, place of residence and designation of each of the partners in this business are as follows:

1. James McHugh; General Partner. 552 25th Avenue, Seattle, Washington.

2. Albert Mayer; Limited Partner. 626 13th Avenue N., Seattle, Washington.

3. R. D. Tembreull; Limited Partner. 626 13th Avenue N., Seattle, Washington.

V.

The term of existence of this partnership shall be for one (1) year, unless sooner terminated by the agreement of the partners. At the end of one year, or sooner, it is agreed that the partnership shall be terminated and the assets of the partnership shall be turned over to a corporation to be formed by the members to carry on said business and that

each of the partners shall have one-third ( $\frac{1}{3}$ ) of the initial issue of the stock in said corporation for his interest.

#### VI.

The total capital of the partnership shall be Four Thousand Five Hundred (\$4,500.00) Dollars, the composition of which is as follows:

James McHugh to assign to the partnership his dealership and all trucking permits which have the agreed value of \$1,500.00;

Albert Mayer to contribute the sum of \$1,500.00 in cash; and

R. D. Tembreull to contribute the sum of \$1,500.00 in cash.

#### VII.

No additional contributions may be required of the limited partners.

#### VIII.

Each partner whether limited or general shall receive his one-third of the stock when this partnership is organized into a corporation, and in the event that this partnership is dissolved by agreement and no corporation organized, then each partner whether limited or otherwise shall receive one-third of the net assets. In addition thereto, the general partner shall receive such additional compensation for the operation of the business as all the partners may agree upon.



IX.

Each partner whether limited or general shall receive one-third of the net profits of the partnership.

X.

No right of substitution shall exist during the term of this partnership.

XI.

No additional partners shall be admitted to the partnership without the unanimous consent of all the partners, both general and limited.

XII.

No priority as to compensation shall exist between the limited partners.

XIII.

In the event of the death, retirement or insanity of the general partner, the partnership shall be dissolved and its business wound up and the contributions of the limited partners returned to them. The death of a limited partner, however, shall not dissolve the partnership but shall entitle his heirs or representatives to the return of his contribution.

XIV.

Books of account shall be kept by or under the directions of the general partner, subject to inspection at all reasonable times by any limited partner.

XV.

Checks on the partnership accounts shall be signed by the general partner and either of the limited partners.

XVI.

The plan of this limited partnership calls for the eventual incorporation of this business as hereinbefore set out, and each partner, both limited and general, is to receive one-third of the initial issue of the stock in the corporation. However, in the event the partnership is dissolved by mutual agreement prior to that time, then each of the limited partners shall receive cash for his contribution and cannot demand and receive some specific property.

/s/ JAMES E. McHUGH,  
General Partner.

/s/ R. D. TEMBREULL,  
Limited Partner.

/s/ ALBERT A. MAYER,  
Limited Partner.

State of Washington,  
County of King—ss.

On this day personally appeared before me James McHugh, Albert Mayer and R. D. Tembreull, to be known to be the individuals described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their

free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 23rd day of June, 1948.

[Seal]            /s/ RICHARD G. McCANN,  
Notary Public in and for the State of Washington,  
residing at Seattle.

[Endorsed]: Filed January 20, 1950.

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[Title of District Court and Cause.]

### ANSWER TO CREDITORS' PETITION

Said James E. McHugh answers the creditors' petition herein as follows:

#### I.

Answering paragraph I of said petition, he denies each and every allegation therein contained and the whole thereof.

#### II.

Answering paragraph II thereof, he admits the same.

#### III.

Answering paragraph III thereof, he admits that the partnership owes debts to the amount of \$1,000.00 and more and that there may be more than twelve (12) creditors of the bankrupt partnership, but denies each and every other allegation therein contained and the whole thereof.

IV.

Answering paragraph IV thereof, he denies each and every allegation therein contained and the whole thereof.

V.

Answering paragraph 5 thereof, he denies the same and alleges that said Tembruell and Mayer must have property or money of the partnership, which may be sufficient to consider it solvent.

VI.

Answering paragraph VI thereof, he denies the same.

Wherefore, your respondent prays that a hearing be had on said petition and this answer, and that the issues presented thereby be determined by a jury.

/s/ JAMES E. McHUGH.

Duly Verified.

[Endorsed]: Filed January 30, 1950.

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[Title of District Court and Cause.]

ADJUDICATION OF BANKRUPTCY

At Seattle, in said district, on the 29th day of March, 1950.

The petition of R. D. Tembruell, Albert A. Mayer and J. Lael Simmons, filed on the 20th day of January, 1950, that the McHugh Trucking Company,

Ltd., a limited partnership and James E. McHugh, as general partner be jointly adjudged bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered, and said petition having been opposed by James E. McHugh; and the issues presented by the pleadings having been tried and determined by the court, and after hearing J. Lael Simmons, attorney for said petitioners, in favor of said petition, and Russell W. Newman, attorney for said alleged bankrupts, in opposition thereto;

Now upon the said petition, verified the 20th day of January, 1950, and the answer of James E. McHugh, verified the 27th day of January, 1950, and it having found that the material facts alleged in said petition were proved, it is

Adjudged that said McHugh Trucking Company, Ltd., a limited partnership, and James E. McHugh, general partner, jointly are and each of them is bankrupt under the Act of Congress relating to bankruptcy.

This adjudication is without prejudice to rights of any creditor or trustee against R. D. Tembruell, or Albert A. Mayer alleged limited partners.

/s/ LLOYD L. BLACK,  
District Judge.

OK as to form and notice of presentation waived  
3/29/50.

/s/ LEE L. NEWMAN,  
Of Counsel.

[Endorsed]: Filed March 29, 1950.

[Title of District Court and Cause.]

ORDER OF REFERENCE

At Seattle in said District on the 29th day of March, 1950, McHugh Trucking Company, a limited partnership and James E. McHugh, general partner, were jointly and each of them was adjudged bankrupt under the Acts of Congress relating to bankruptcy. Now therefore, it is hereby

Ordered that the above entitled proceeding be and it hereby is referred to the Honorable Van C. Griffin, one of the Referees in Bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act and that the said bankrupt shall henceforth attend before the said referee and submit to such orders as may be made by him or by a judge of this Court relating to said bankruptcy.

Done in open Court this 5th day of April, 1950.

/s/ LLOYD L. BLACK,  
District Judge.

Presented by:

/s/ MILLARD P. THOMAS,  
Clerk, U. S. District Court.

[Endorsed]: Filed April 5, 1950.

[Title of District Court and Cause.]

ORAL DECISION BY JUDGE BLACK

March 24, 1950.

The Court: I am ready to rule. The partnership known as McHugh Trucking Company, the alleged bankrupt, is and since at least October 22, 1949 has been hopelessly insolvent as a partnership. It is and since at least October 22, 1949 has been unable to pay its bills or obligations. Within four months last past acts of bankruptcy have been suffered by the partnership. As of necessity the partnership is adjudicated bankrupt and will be referred to Van C. Griffin, Referee in Bankruptcy, at Seattle, Washington for appropriate proceedings.

As between Mr. McHugh and Mr. Tembreull and Mr. Mayer it would appear that the partnership is a limited partnership as to Mr. Mayer and Mr. Tembreull and that McHugh is and has been the general partner. What the status of the liability of Mr. Tembreull and Mr. Mayer may be with respect to creditors of the partnership is not being determined by me at this time. The creditors in this bankruptcy proceeding are to be entitled to such rights, if any, as they may have against Mr. Tembreull and Mr. Mayer. The Trustee to be appointed in bankruptcy of this partnership is to have such rights, if any, as under the facts and the law he may have against Mr. Tembreull and Mr. Mayer.

I am not indicating by this that Mr. Mayer or Mr. Tembreull or either of them have any liability

to any creditors other than such as they in writing specially assumed as to some special creditor or creditors. I am not indicating that they do not have liability in some degree to some or all of the creditors. I am not indicating that they are or are not as against creditors or some of them estopped to deny that they became general partners.

I may say that the attitude of Mr. McHugh in this proceeding as it appears to me is one, unfortunately, which is too frequently the attitude of an individual who has received many financial benefits and aids from someone and then thereafter seeks to repay them by most regrettable ingratitude. In any event, under this evidence Mr. Mayer and Mr. Tembreull have lost thousands of dollars. In any event, under the evidence Mr. McHugh has lost nothing. In any event, under the evidence as presented to me Mr. McHugh has endeavored to make Mr. Mayer and Mr. Tembreull lose many more thousands of dollars, all, so far as I can see, because they were foolish enough to believe that he had the ability to run this business. But he is not the first person, and, unfortunately, will not be the last one who has sought to repay financial aid by an attempt to financially injure those who tried to help him.

But whatever may be the equities as between Mr. McHugh on the one hand and Mr. Mayer and Mr. Tembreull on the other, the Court will have to consider the rights of creditors. Mr. Tembreull and Mr. Mayer may be more protected than the creditors or some of them are going to claim. It may prove to



be the fact ultimately that they have lost a lot more money than the amounts they have already advanced.

\* \* \* \* \*

[Endorsed]: Filed July 24, 1950.

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[Title of District Court and Cause.]

### SPECIAL APPEARANCE

Come Now R. D. Tembreull and Albert Mayer and appearing specially herein, object to the jurisdiction of the Referee.

/s/ SIMMONS & McCANN,  
Attorneys for Mayer and  
Tembreull.

Acknowledgment of Service attached.

[Endorsed]: Filed December 18, 1950.

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[Title of District Court and Cause.]

### REFEREE'S CERTIFICATE ON REVIEW

To the Honorable John C. Bowen, United States District Judge:

I, Van C. Griffin, Referee in Bankruptcy in charge of this proceeding do hereby certify:

Albert Mayer and R. D. Tembruell and J. Lael Simmons filed a Creditors' Petition against Mc-

Hugh Trucking Company, a limited partnership, and James E. McHugh, General Partner, alleging therein that the said partnership was insolvent and was indebted to them as follows:

J. Lael Simmons: Professional services	
and cash .....	\$ 568.80
Albert Mayer: Cash loaned.....	11,611.19
R. D. Tembruell: Cash loaned.....	11,611.19

The Petition further alleged that McHugh Trucking Company is a limited partnership based upon a contract attached to said Petition and that James E. McHugh was a general partner and Albert Mayer and R. D. Tembruell were limited partners. Subpoenas were issued and served upon no creditor but only upon James E. McHugh. After hearing an Order of Adjudication of Bankruptcy was entered containing the following language:

“Adjudged that said McHugh Trucking Company Lt., a limited partnership, and James E. McHugh, general partner, jointly are and each of them is bankrupt under the Act of Congress relating to bankruptcy.

“This adjudication is without prejudice to rights of any creditor or trustee against R. D. Tembruell, or Albert A. Mayer alleged limited partners.

/s/ LLOYD L. BLACK,  
District Judge.

“O.K. as to form and notice of presentation waived 3/29/50.

LEE L. NEWMAN,  
Of Counsel.”

Pursuant to an Order by this Referee after the matter had been referred to him by general Order of Reference, James E. McHugh filed his Statement of Affairs in which he stated, in answer to paragraphs 14 and 15, that R. D. Tembruell, Albert Mayer and James E. McHugh were all general partners and that the withdrawal by Tembruell and Mayer contributed to the bankruptcy of the partnership and the schedules filed indicated that if certain obligations were against the partnership, they were incurred by Mayer and Tembruell.

On December 7, 1950, the Honorable William J. Steinert duly qualified as Trustee herein and filed his Petition setting forth that the contract of limited partnership was not filed until after the scheduled indebtedness had been incurred and until April 20, 1949, and that Albert Mayer and R. D. Tembruell were, in fact, general partners and each exercised control over the business of said partnership, and upon that Petition the Referee entered an Order for Examination of Albert Mayer and R. D. Tembruell and directing them to show cause, if any, why they should not be required and ordered to file bankruptcy schedules of assets and liabilities as provided by the Bankruptcy Act, and in response to that Order they did appear, a hearing was had, they and the Trustee produced oral and documentary evidence and at the conclusion of the hearing the Referee entered an Order on January 29, 1951, directing Albert Mayer and R. D. Tembruell to file bankruptcy schedules herein. Albert Mayer and R. D. Tembruell filed Objections to the

Order and on February 7, 1951, filed herein their Petition for Review of said Order directing them to file schedules in bankruptcy.

### Statement of Questions Presented

From the evidence the Referee found as a fact that Albert Mayer and R. D. Tembruell personally participated in the management and control and the incurring of obligations of the McHugh Trucking Company, that the principal bank account was under their control, another bank account under their control jointly with McHugh, that the secured indebtedness and the partially secured indebtedness and much of the unsecured indebtedness was incurred by them before the filing of the contract of limited partnership, that the main office of the McHugh Trucking Company for a while was at their residence. The Referee decided these acts made them general partners.

The Referee decided as a matter of law that the provision in paragraph XV of the Certificate of Limited Partnership (copy attached to Petition; also, certified photostatic copy in Exhibit file), to-wit:

“Checks on the partnership accounts shall be signed by the general partner and either of the limited partners.”

deprived the persons named as limited partners of the protection of the provisions of the Limited Partnership Act, Section 9975-7, which states:

“A limited partner shall not become liable as a general partner unless he, in addition to the exercise of his rights and powers as a limited partner, takes part in the control of the business.”

The Referee concluded that the control of the bank accounts is a control of a vital part of the business.

The Uniform Limited Partnership Act, being Section 9975-2, provides for the filing of the contract or certificate of record in the office of the County Clerk and in this case it was proved and admitted that this was not done until long after much of the indebtedness was incurred when, of course, the filing would be futile as to existing creditors.

The Referee, having decided that the parties, Albert Mayer and R. D. Tembruell, were in fact general partners, based his authority to direct them to file schedules in the Order entered by him on January 29, 1951, upon the following authorities:

In *Re Sugar Valley Gin Co.*, 4 A.B.R. (N.S.)  
140, 292 Fed. 508

the court held that the individual parties as components of the partnership should be required to file schedules of their individual assets and liabilities.

Remington on Bankruptcy, Vol. 1, Sec. 73:

“Where only the firm is adjudicated bankrupt, and none of the individual members, or not all of them, also, the estates of the individual mem-

bers, nevertheless, are involved and are to be administered in the bankruptcy.”

Volume 1 in Collier on Bankruptcy (14th Ed.),  
p. 714, Sec. 5:19:

“The trustee of a partnership may take possession of and administer the property of an unadjudicated partner, so far as is necessary to settle the partnership estate.”

Also, 1949 Supplement of Collier on Bankruptcy,  
page 721.

Remington, Vol. 6, Section 2887:

First National Bank of Herkimer v. Poland  
Union, 42 A.B.R. (N.S.) 99 109 Fed. (2) 54.

Francis v. McNeal, 228 U.S. 695.

Kaufman Brown Potatoe Co. v. Long, 9th Cir-  
cuit, May 11, 1950, No. 12390.

#### Papers Transmitted

1. Trustee's Petition, December 7, 1950.
2. Order for Examination of Bankrupt and Order to Show Cause signed December 13, 1950.
3. Order directing Albert Mayer and R. D. Tembreull to file bankruptcy schedules, dated January 29, 1951.
4. Petition of Albert Mayer and R. D. Tembreull for Review, filed February 7, 1951.
5. Transcript of Hearing on Order to Show Cause, filed February 28, 1951, together with the following Exhibits:

(1) Trustee's Exhibit No. 1, signature card—  
Seattle First National Bank.

(2) Trustee's Exhibit No. 2, claim of Seattle  
First National Bank.

(3) Trustee's Exhibit No. 3, being cancelled  
checks and ledger sheets.

(4) Trustee's Exhibit No. 4, Combined Authority,  
Individual Guaranty and Pledge Agreements for  
Partnerships (Seattle First National Bank).

(5) Trustee's Exhibit No. 5, Auditor's Report.

Dated at Seattle, Washington, this 3rd day of  
April, 1951.

Respectfully submitted,

/s/ VAN C. GRIFFIN,  
Referee in Bankruptcy.

[Endorsed]: Filed April 4, 1951.

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[Title of District Court and Cause.]

### PETITION AND REPORT OF TRUSTEE

Comes now William J. Steinert as trustee of the  
above named bankrupt, and respectfully shows the  
court:

#### I.

That since October 30, 1950, William J. Steinert  
has been, and now is, the duly appointed, qualified  
and acting trustee of the above named bankrupt.

## II.

That James McHugh, Albert Mayer and R. D. Tembreull, on or about the 23rd day of June, 1948, entered into a purported limited partnership agreement; that the above entitled court on March 29, 1950, adjudicated that McHugh Trucking Company, a limited partnership, and James T. McHugh jointly are and each of them is bankrupt; that said adjudication was based upon a petition filed by Albert Mayer, R. D. Tembreull and Leal Simmons allegeding that Albert Mayer and R. D. Tembreull were limited partners and that James McHugh was a general partner; that in truth and in fact said Albert Mayer, R. D. Tembreull and James McHugh were general partners doing business as McHugh Trucking Company; that each of said partners exercised control over the business of said partnership and that said certificate of limited partnership was not filed with the Clerk of King County until April 20, 1949, and that the indebtedness contracted by said partnership was all contracted prior to April 20, 1949.

## III.

That the estate herein owns one 1945 International Truck and Trailer; that same was heretofore appraised by Leo C. Kendrick on August 23, 1950, in the sum of \$4,500.00; that the trustee believes that said sum was excessive and is informed that the motor has been torn out; that three wheels and three tires are missing; that said truck has been stored with Redmon-Fairchild, Inc., 302 South 4th



Avenue, Yakima, Washington; that the trustee believes that said truck and trailer should be reappraised and its real value determined.

IV.

That said truck and trailer has heretofore been determined to be partnership property and non-exempt.

V.

That said truck and trailer should be offered for sale to the highest and best bidder for cash and that for the best interests of the estate herein said sale be made at private sale, subject to the approval of the court.

VI.

That James McHugh, bankrupt, should be further examined as a bankrupt with reference to missing parts of said equipment and with reference to other assets of the bankrupt estate.

VII.

That Albert Mayer and R. D. Tembreull should be required to show cause, if any, why they should not be held to be general partners of James McHugh, doing business as McHugh Trucking Company, and file schedules of their assets and liabilities in the above entitled estate.

Wherefore, petitioner prays the court that a meeting of the creditors herein be called and that at said meeting James McHugh be re-examined as a bankrupt; that Albert Mayer and R. D. Tembreull be

ordered to show cause why they should not be held and determined to be general partners with James McHugh in the firm of McHugh Trucking Company, and to file schedules of their assets and liabilities herein as required by law and that a sale be had of the 1945 International Truck and Trailer and for the transaction of such other and further business as may properly come before the meeting.

/s/ WILLIAM J. STEINERT,  
Petitioner.

Duly Verified.

[Endorsed]: Filed December 7, 1950.

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[Title of District Court and Cause.]

ORDER FOR EXAMINATION OF BANKRUPT  
AND ORDER TO SHOW CAUSE

The petition and report of the trustee coming on regularly for hearing and it appearing that a meeting of the creditors of the above named bankrupt should be called, that the bankrupt McHugh should be examined and that an order to show cause should issue to Albert Mayer and R. D. Tembreull as hereinafter provided, the court being fully advised in the premises,

It Is Hereby Ordered that James McHugh, bankrupt, be and he is hereby ordered and directed to be and appear before the undersigned Referee at his office 600 Federal Court House, Seattle, Washington, on the 19th day of December, 1950, at 2:30 o'clock p.m., for examination.

It Is Further Ordered that Albert Mayer and R. D. Tembreull be and they each are hereby ordered and directed to be and appear before the undersigned Referee in Bankruptcy at his office 600 Federal Court House, Seattle, Washington, on the 19th day of December, 1950, at 2:30 o'clock p.m. for examination and then and there to show cause, if any, why they and each of them should not be held and decreed to be general partners with James McHugh, bankrupt, in that certain partnership known and described as McHugh Trucking Company, and further to show cause, if any, why they should not be required and ordered to file bankruptcy schedules of assets and liabilities as provided in the Bankruptcy Act.

Dated at Seattle, Washington, this 13th day of December, 1950.

/s/ VAN C. GRIFFIN,  
Referee in Bankruptcy.

[Endorsed]: Filed December 14, 1950.

[Title of District Court and Cause.]

ORDER DIRECTING ALBERT MAYER AND  
R. D. TEMBREULL TO FILE BANK-  
RUPTCY SCHEDULES

This matter coming on regularly for hearing before the Hon. Van C. Griffin, Referee in Bankruptcy, upon an order for examination of the bankrupt and examination of Albert Mayer and R. D. Tembreull and to show cause, if any, why the said Albert Mayer and R. D. Tembreull should not be held and decreed to be general partners with James McHugh, bankrupt, in that certain partnership known and described as McHugh Trucking Company, and further to show cause why they should not be required and ordered to file bankruptcy schedules of assets and liabilities as provided in the Bankruptcy Act on the 19th day of December, 1950, and the hearing thereon having been continued to January 12, 1951, when said matter was called for a hearing and there appeared William J. Steinert, Trustee, and Nelson R. Anderson, as his attorney, Albert Mayer and R. D. Tembreull and Simmons & McCann, their attorneys, James McHugh and J. Vernon Clemens, his attorney, and the Referee having considered the special appearances of Albert Mayer and R. D. Tembreull objecting to the jurisdiction of the Referee and having overruled said objections, and having heard certain admissions and certain denials of the said Albert Mayer and R. D. Tembreull to the petition of the trustee herein on which the show cause order was

based and having heard the evidence offered herein, finds that James McHugh, Albert Mayer and R. D. Tembreull entered into a partnership agreement on June 13, 1948, denominated by them as a limited partnership and that said parties did not file said agreement with the Clerk of King County, Washington, until April 20, 1949, and that in the interim a material part of the indebtedness contracted by said partnership was incurred and remains unpaid; that said Mayer and said Tembreull opened a general checking account in the Seattle First National Bank wherein were deposited funds of said partnership; that said Mayer and said Tembreull alone signed the signature card; that the said James McHugh's name did not appear on said signature card of said partnership and that he had no right, power or authority to sign any checks on said partnership account; that the funds entering into said partnership account and the funds disbursed out of said partnership account were under the exclusive possession and control of the said Mayer and the said Tembreull; that a loan on behalf of said partnership was contracted with said bank by said three partners and that a general promissory note executed by the three partners was delivered to said bank and that said note was secured by a chattel mortgage on trucks and equipment of said partnership and said chattel mortgage was executed by the three partners; that said three partners negotiated for the purchase of certain trucks from Philippine Produce Company and they purchased trucks from said company; that said Mayer and Tembreull employed an

accountant for said partnership and employed counsel for said partnership; participated in the hiring of drivers for said trucks; participated in the soliciting of business for said partnership and exercised control over said partnership and its business and operations and were limited partners only in name and were actual partners in fact, the court being fully advised in the premises,

It Is Hereby Ordered, Determined and Adjudicated That James McHugh, Albert Mayer and R. D. Tembreull, from the date of the formation of said partnership to the date of the adjudication herein, were and are now general partners doing business under the name and style of McHugh Trucking Company.

It Is Further Ordered that Albert Mayer and R. D. Tembreull be and they are hereby directed and commanded to file herein, within ten days, bankruptcy schedules, listing all assets and liabilities of each of them, in the form and content as prescribed by the Bankruptcy Act.

Dated at Seattle, Washington, this 29th day of January, 1951.

/s/ VAN C. GRIFFIN,  
Referee in Bankruptcy.

Presented by:

/s/ NELSON R. ANDERSON,  
Attorney for Trustee.

[Endorsed]: Filed January 29, 1951.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To: Van C. Griffin, Esquire, Referee in Bankruptcy:

The petition of R. D. Tembreull and Albert A. Mayer, respectfully represents that:

1. Your petitioners are aggrieved by the order herein of Van C. Griffin, Referee in Bankruptcy, dated January 29, 1951, a copy of which order is annexed hereto marked Exhibit A and made a part hereof.

2. The Referee erred in overruling the special appearance of your petitioners, which special appearance was clearly well taken under the law.

3. The Referee erred in respect to said order in finding that a material part of the indebtedness contracted by the bankrupt partnership was incurred prior to April 20, 1949. The Referee further erred in not designating specific items and amounts that were allegedly incurred prior to said date without determining whether said indebtedness was incurred with knowledge or responsibility of the limited partners.

4. The Referee erred in holding the account in the Seattle First National Bank which was used by your petitioners to assist the limited partnership and the general partner, to be a partnership account. Said bank account under the proof consisted of funds voluntarily used by your petitioners to aid said partnership without any obligation whatsoever on the part of said petitioners so to do. The Referee erred further in holding that there was any

duty to include James McHugh's name as an authorized signature to checks drawn on said account.

5. Referee further erred in construing the credit of your petitioners as limited partners loaned to the partnership by signing a promissory note to the Seattle First National Bank as such control of the partnership as would change the character of petitioners from limited partners to general partners. The same error was committed by said Referee in respect to the transaction with the Philippine Produce Company.

6. The Referee further erred in holding that the nominating of a business accountant or attorney constituted such participation in control of the business and affairs of the corporation as to change the nature of petitioners from limited to general partners.

7. Referee further erred in presuming to adjudicate your petitioners as general partners in the McHugh Trucking Company.

8. In the absence of a petition for adjudication of petitioners as bankrupts and an order of adjudication by the court, the order of the Referee in directing or commanding your petitioners to file bankruptcy schedules herein is premature.

9. The order adjudging McHugh Trucking Company and James McHugh, General partner therein bankrupt was predicated upon a petition signed by your petitioners as limited partners and general unsecured creditors under the Acts of Congress relating to bankruptcies. To now hold your petitioners as general partners as to all creditors without lim-



itation and without designation is in effect to reverse the District Court and remove the footings from under the order of adjudication. It was error for the Referee to make an order with that effect.

Wherefore your petitioners pray that said order be reviewed by a Judge in accordance with the provisions of the Act of Congress relating to Bankruptcy; that said Order be reversed and that your petitioners have such other further and different relief as is just.

Dated at Seattle, Washington, this 7th day of February, 1951.

/s/ R. D. TEMBREULL,

/s/ ALBERT A. MAYER.

/s/ SIMMONS & McCANN,

Attorneys for Petitioners.

Acknowledgment of Service attached.

[Endorsed]: Filed February 7, 1951.

United States District Court, Western District of  
Washington, Northern Division

No. 38,376

In the Matter of

McHUGH TRUCKING COMPANY, a limited  
partnership, and JAMES E. McHUGH, Gen-  
eral Partner,

Bankrupt.

ORDER

On the 6th day of July, 1951 this matter came on regularly to be heard before the undersigned United States District Judge, upon the petition of R. D. Tembreull and Albert A. Mayer for a review of the order of the Referee in Bankruptcy entered herein on the 29th day of January, 1951 determining that James McHugh, Albert Mayer and R. D. Tembreull were and are general partners doing business under the name and style of McHugh Trucking Company, and ordering Albert Mayer and R. D. Tembreull to file bankruptcy schedules listing all assets and liabilities of each of them; said R. D. Tembreull and Albert A. Mayer appearing by and through their attorneys, Simmons & McCann, and the Trustee, William J. Steinert, appearing by Nelson R. Anderson, his attorney, and the court having heard the argument of Nelson R. Anderson, attorney for the Trustee, and counsel for R. D. Tembreull and Albert A. Mayer having failed to appear, and the court having read the briefs filed herein on behalf of each party, and it appearing to the court and the court

finding from the evidence adduced before it and from the Referee's certificate and the record that R. D. Tembreull and Albert A. Mayer personally participated in such manner in the management and control of the business of the McHugh Trucking Company during the period of time involved herein so as to constitute them general partners; and

The court finding from the evidence and the argument and briefs of counsel, as aforesaid, that said R. D. Tembreull and Albert A. Mayer did so conduct themselves as to constitute them general partners along with James McHugh in the operation of the McHugh Trucking Company, and the court being otherwise fully advised in the premises,

Now Therefore, it is Ordered, Adjudged and Decreed that the order of the Referee in Bankruptcy directing R. D. Tembreull and Albert A. Mayer to file bankruptcy schedules as provided in said order, be, and the same is hereby, approved, ratified and confirmed.

Dated this 9th day of August, 1951.

/s/ WILLIAM J. LINDBERG,  
United States District Judge.

[Endorsed]: Filed August 9, 1951.

United States District Court, Western District of  
Washington, Northern Division

No. 38,376

In the Matter of  
McHUGH TRUCKING COMPANY, a limited  
partnership, and JAMES E. McHUGH, Gen-  
eral Partner,

Bankrupt.

### ORDER

On the 27th day of August, 1951, this matter came on regularly to be heard before the undersigned United States District Judge upon the motion of R. D. Tembreull and Albert A. Mayer for reconsideration, or in the alternative for re-hearing of this Court's Order dated the 9th day of August, 1951, which approved, ratified and confirmed the Referee in Bankruptcy's Order directing appellants to file bankruptcy schedules; this Court granted the motion for re-hearing and proceeded to hear the argument of counsel, J. Lael Simmons, representing R. D. Tembreull and Albert A. Mayer, and Nelson R. Anderson appearing as attorney for the trustee, William J. Steinert.

Upon completion of counsel's argument the undersigned Judge indicated that he would take the matter under advisement and inform counsel of his decision in open court on Tuesday, September 4, and in conformity with said oral decision, it is

Ordered, Adjudged and Decreed that this Court's Order dated the 9th day of August, 1951, which approved the Order of the Referee in Bankruptcy is hereby re-affirmed and confirmed without prejudice

to the rights of R. D. Tembreull and Albert A. Mayer to interpose such motions as the law allows against the original petition in bankruptcy under which the McHugh Trucking Company and James E. McHugh were adjudicated bankrupts.

Dated this 17th day of September, 1951.

/s/ WILLIAM J. LINDBERG,  
United States District Judge.

Presented by:

/s/ J. LAEL SIMMONS,  
Attorney for R. D. Tembreull  
and Albert A. Mayer.

Approved as to form:

/s/ NELSON R. ANDERSON,  
Attorney for Trustee.

[Endorsed]: Filed September 17, 1951.

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[Title of District Court and Cause.]

### COST BOND ON APPEAL

The undersigned, R. D. Tembreull and Albert A. Mayer, appellants herein, and National Surety Corporation, surety, appearing and submitting to the jurisdiction of the court, hereby undertake for themselves and each of them, their and each of their heirs, executors, administrators, successors and assigns, to make good all taxable costs and charges, not exceeding the sum of Two Hundred Fifty Dollars (\$250.00), that the appellee may be put to or allowed if the appeal is dismissed or the judgment

affirmed, or such costs as the appellate court may award if the judgment is modified.

The said surety hereby irrevocably appoints the clerk of this court as his agent upon whom any papers affecting his liability on this undertaking may be served.

Signed, Sealed, and Delivered this 17th day of October, 1951.

/s/ R. D. TEMBREULL,

/s/ ALBERT A. MAYER,

/s/ By J. LAEL SIMMONS,

Attorney for Appellants.

[Seal]

NATIONAL SURETY COR-  
PORATION,

/s/ By RAYMOND C. WEISS,

Attorney-in-Fact.

[Endorsed]: Filed October 17, 1951.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

To: William J. Steinert, Trustee in Bankruptcy,  
and Nelson R. Anderson, Attorney for Trustee:

Notice is given that Albert A. Mayer and R. D. Tembreull hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order of the above-entitled Court dated September 17, 1951, which reaffirmed and confirmed its earlier Order dated August 9, 1951, which approved on ap-

peal the Order of the Referee in Bankruptcy dated January 29, 1951, which ruled that Albert A. Mayer and R. D. Tembreull, from the date of the formation of the McHugh Trucking Company to the date of the adjudication, were and now are general partners in said firm, and which further ordered Albert A. Mayer and R. D. Tembreull to file bankruptcy schedules listing all of the assets and liabilities of each of them.

Dated this 17th day of October, 1951.

/s/ J. LAEL SIMMONS,  
Attorney for R. D. Tembreull  
and Albert A. Mayer.

[Endorsed]: Filed October 17, 1951.

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[Title of District Court and Cause.]

ORDER DENYING MOTION TO DISMISS  
PETITION IN BANKRUPTCY

The motion of R. D. Tembreull and Albert A. Mayer "to dismiss the petition in bankruptcy in this cause filed against McHugh Trucking Company and James E. McHugh insofar as it seeks to adjudicate the McHugh Trucking Company, a bankrupt" coming on regularly for hearing; J. Lael Simmons appearing for the moving parties, and Nelson R. Anderson appearing for William J. Steinert, Trustee in Bankruptcy, and the Court having considered the motion and the objections of

the Trustee thereto and having heard the arguments of counsel, and being fully advised, it is hereby

Ordered that the motion to dismiss filed by R. D. Tembreull and Albert A. Mayer be and the same hereby is denied.

Dated this 2nd day of November, 1951.

/s/ WILLIAM J. LINDBERG,  
United States District Judge.

[Endorsed]: Filed November 2, 1951.

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[Title of District Court and Cause.]

#### MEMORANDUM

On the 29th day of March, 1950, after hearing before the Honorable Lloyd L. Black, since deceased, upon the petition of R. D. Tembreull, Albert A. Mayer and J. Lael Simmons, the McHugh Trucking Company, a limited partnership, and James E. McHugh, general partner, were adjudged bankrupt. The adjudication provided as follows:

“\* \* \* it is

“Adjudged that said McHugh Trucking Company Ltd., a limited partnership, and James E. McHugh, general partner, jointly are and each of them is bankrupt under the Act of Congress relating to bankruptcy.

“This adjudication is without prejudice to rights of any creditor or trustee against R. D. Tembreull, or Albert A. Mayer alleged limited partners.”

On the 5th day of April, 1950 the matter was referred to the Referee for further proceedings.



Thereafter, following a hearing before the Referee in Bankruptcy, it was determined that James McHugh, Albert Mayer and R. D. Tembreull were general partners doing business as the McHugh Trucking Company, and Mayer and Tembreull were directed to file bankruptcy schedules. The order was contained in the following language:

“It Is Hereby Ordered, Determined and Adjudicated That James McHugh, Albert Mayer and R. D. Tembreull, from the date of the formation of said partnership to the date of the adjudication herein, were and are now general partners doing business under the name and style of McHugh Trucking Company.

“It Is Further Ordered that Albert Mayer and R. D. Tembreull be and they are hereby directed and commanded to file herein, within ten days, bankruptcy schedules, listing all assets, and liabilities of each of them, in the form and content as prescribed by the Bankruptcy Act.”

Tembreull and Mayer petitioned for a review of the order of the Referee, which order, after argument and presentation of briefs, was approved on August 9, 1951 by the undersigned Judge. Subsequently, upon motion of counsel for Tembreull and Mayer for a rehearing, the matter was again argued and the order entered August 9, 1951 was reaffirmed in an oral decision given on September 4, 1951. Pursuant to said oral decision the following order was signed on September 17, 1951:

“\* \* \* it is

“Ordered, Adjudged and Decreed that this Court’s

Order dated the 9th day of August, 1951, which approved the Order of the Referee in Bankruptcy is hereby re-affirmed and confirmed without prejudice to the rights of R. D. Tembreull and Albert A. Mayer to interpose such motions as the law allows against the original petition in bankruptcy under which the McHugh Trucking Company and James E. McHugh were adjudicated bankrupts."

Motion of R. D. Tembreull and Albert A. Mayer "to dismiss the petition in bankruptcy in this cause filed against McHugh Trucking Company and James E. McHugh insofar as it seeks to adjudicate the McHugh Trucking Company, a bankrupt" was filed September 17, 1951, briefs were submitted and oral arguments of counsel heard by the Court. The petition to dismiss must be denied. The language of the adjudication made by Judge Black has been set forth above. Under it McHugh Trucking Company, a limited partnership, and James E. McHugh, general partner, jointly, were adjudged bankrupt. The adjudication was without prejudice to the rights of any creditor or the trustee. It is apparent from the transcript of the proceedings before Judge Black that when the adjudication was made counsel for the petitioners clearly understood that the rights of any creditor or the trustee against R. D. Tembreull and Albert A. Mayer were reserved. In view of the reservation contained in the adjudication the petitioners must have anticipated some hearing to determine whether or not R. D. Tembreull and Albert A. Mayer were or were not general partners in so far as the rights of creditors were concerned. **After the Referee made his finding that R. D. Tem-**

breull and Albert A. Mayer were general partners he ordered that they file in the proceeding bankruptcy schedules, listing all assets and liabilities of each of them, in the form and content as prescribed by the Bankruptcy Act. There is nothing in the order of the Referee which attempts in any manner to change or modify the adjudication as rendered by Judge Black.

The case of Kaufman-Brown Potato Company vs. Long, 182 F. 2d, 594 is not applicable in this situation. In that case the Trustee in Bankruptcy asked that an order to show cause issue as to "why an order should not be made and entered herein ordering, adjudging and decreeing that each of them (Kaufman, Brown and Kaufman-Brown Potato Company) is a general partner of Gerry Horton Farms, one of the \* \* \* bankrupts, and why a further order should not be made and entered therein amending, modifying and changing the order of adjudication \* \* \* in conformity to the foregoing \* \* \*." The Referee's order was approved by the Court and the order of adjudication was amended so that not only were the four previously adjudicated bankrupts declared bankrupt but in addition a different business enterprise was adjudged bankrupt. The Trustee in the case before us has made no such request and there has been no order entered by the Referee or Judge modifying the original order signed by Judge Black. The adjudication having been made as the result of the petition of Tembreull and Mayer and Simmons, and with their full understanding that it was without prejudice to the rights of creditors, they should have

anticipated the investigation and hearing before the Referee and the possibility of a finding such as was made, namely, that Tembreull and Mayer were general partners. The finding having been different than they may have anticipated they are not in a position now to come back to the Judge and ask that the adjudication be changed. Furthermore, while there is some testimony in the original hearing before Judge Black that the partners, Tembreull and Mayer, were personally solvent no finding was made upon that issue and in order to determine what the actual conditions were or are as to the financial status of Tembreull and Mayer it is necessary that they submit schedules such as were ordered and directed under the order of the Referee.

The motion to dismiss filed by R. D. Tembreull and Albert A. Mayer is denied.

Dated November 2, 1951.

/s/ WILLIAM J. LINDBERG,  
United States District Judge.

[Endorsed]: Filed November 2, 1951.

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[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE COURT OF  
APPEALS FOR THE NINTH CIRCUIT

To: William J. Steinert, Trustee in Bankruptcy,  
and Nelson R. Anderson, Attorney for Trustee:

Notice is given that Albert A. Mayer and R. D. Tembreull hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order of the above-entitled court dated November 2, 1951,

which denied the motion filed by R. D. Tembreull and Albert A. Mayer September 17, 1951, which motion requested the dismissal of the original petition in bankruptcy filed against McHugh Trucking Company and James E. McHugh insofar as it sought to adjudicate the McHugh Trucking Company as a bankrupt.

Dated this 5th day of November, 1951, at Seattle, Washington.

/s/ J. LAEL SIMMONS,  
Attorney for R. D. Tembreull,  
Albert A. Mayer.

[Endorsed]: Filed November 5, 1951.

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[Title of District Court and Causee.]

STIPULATION AND ORDER EXTENDING  
TIME FOR FILING RECORD ON  
APPEAL

It is hereby stipulated by and between J. Lael Simmons, attorney for R. D. Tembreull and Albert A. Mayer, and Nelson R. Anderson, attorney for trustee, that the time for filing the record on appeal and docketing the appeal with the United States Court of Appeals for the Ninth Circuit be extended until and including Wednesday, January 2, 1952.

/s/ J. LAEL SIMMONS,  
By L. M. Y.

Attorney for R. D. Tembreull  
and Albert A. Mayer.  
NELSON R. ANDERSON,  
Attorney for Trustee.

## ORDER

This matter having come on for hearing before the undersigned judge of the above-entitled court on the stipulation of the parties for extension of the time for filing the record on appeal and docketing the appeal, the court having considered the records and files herein and it appearing that the time for filing and docketing as originally prescribed has not expired,

Ordered that the time for filing the record on appeal and docketing the appeal with the United States Court of Appeals for the Ninth Circuit be and is hereby extended until and including Wednesday, January 2, 1952.

Done in Open Court this 16th day of November, 1951.

/s/ JOHN C. BOWEN,  
Judge.

[Endorsed]: Filed November 16, 1951.

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[Title of District Court and Cause.]

## CERTIFICATE OF CLERK

United States of America,  
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as Amended,

of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, as amended, I am transmitting herewith all of the original pleadings on file and of record in said cause in my office at Seattle, together with Petitioner's Exhibits 1 and 3, and Trustee's Exhibits 1 to 5 inclusive, as set forth below, and that said pleadings and exhibits constitute the record on appeal from the Order dated September 17, 1951, which reaffirmed and confirmed its earlier Order filed and entered August 9, 1951, and from the Order denying motion to dismiss petition in bankruptcy filed and entered November 2, 1951, to the United States Court of Appeals for the Ninth Circuit, to-wit:

1. Creditor's Petition.
2. Praecipe.
3. Appearance of Attorney I. J. Bounds, Attorney for Bankrupt.
4. Motion of James E. McHugh for change of venue.
5. Answer of James E. McHugh, alleged bankrupt, to creditors' petition.
6. Application of James E. McHugh for jury trial.
7. Subpoena to Alleged Bankrupt with Sheriff's return of service upon James E. McHugh, manager of said McHugh Trucking Co., and James E. McHugh.
8. Acceptance of Service by Simmons & McCann, attorneys for Petitioning Creditors, of Appearance, Motion for Change of Venue, Answer and Application for Jury Trial.

9. Notice of Motion for change of venue filed by Attorneys for Petitioners.

10. Acceptance of service of foregoing notice of motion by attorney for alleged bankrupt.

11. Motion of petitioning creditors to strike demand for jury and to set cause for hearing.

12. Notice of petitioning creditors to set for hearing motion to strike demand for jury.

13. Copy of letter from Clerk of Court to Mr. I. J. Bounds.

14. Waiver of notice of presentation of Order of Adjudication, signed by Lee L. Newman for Russell W. Newman.

15. Adjudication of Bankruptcy.

16. Order of Reference.

17. Petition for Relinquishment of Books and Records.

18. Order Relinquishing Books and Records.

19. Statement of Affairs.

19-a. Petition and Schedules.

20. Bond of Trustee Richard Kent Stacer.

21. Reporter's transcript of oral decision by Judge Black on March 24, 1950.

22. Trustee's receipt of certain impounded documents from Clerk of Court.

23. Copy of Referee's order of disbursements.

24. Filed copy of Referee's order approving resignation of trustee and exonerating his bond.

25. Bond of Trustee William J. Steinert.

26. Special Appearance of R. D. Tembreull and Albert Mayer.



27. Referee's Certificate on Review, attached to which are the following:

27-a. Petition and Report of Trustee.

27-b. Order for Examination of Bankrupt, and Order to Show Cause.

27-c. Order Directing Albert Mayer and R. D. Tembreull to File Bankruptcy Schedules.

27-d. Petition for Review.

27-e. Copy of Order directing Albert Mayer and R. D. Tembreull to file bankruptcy schedules.

27-f. Reporter's transcript of show cause hearing 1/12/1951.

28. Referee's certificate of having mailed notice and copy of Referee's Certificate on Review.

29. Notice of filing of Referee's certificate on review.

30. Letter from Referee to Clerk of Court.

31. Stipulation extending time for submitting points and authorities.

32. Appellants memorandum of points and authorities.

33. Stenographic transcript of proceedings on March 24, 1950.

34. Trustee's brief.

35. Notice of issue of law, Petition for Review.

36. Appellants' reply memorandum of points and authorities.

37. Trustee's additional authorities.

38. Trustee's authorities.

39. Reporter's transcript of Court's remarks July 6, 1951.

40. Order signed by Judge William J. Lindberg.

41. Trustee's additional authorities.
42. Appellants' answer to trustee's additional authorities; Appellants' argument in lieu of oral argument.
43. Motion for reconsideration or in alternative for rehearing.
44. Order signed by Judge William J. Lindberg.
45. Notice of Hearing of Motion signed by J. Lael Simmons.
46. Brief of Trustee on Motion to Dismiss.
47. Answer of Trustee to Motion to dismiss original petition alleging bankruptcy.
- 47-a. Application of attorney Leslie M. Yates for permission to participate in case.
- 47-b. Brief of Albert A. Mayer and R. D. Tembreull in support of motion to dismiss.
48. Affidavit of Esther M. Rosser re first meeting of creditors.
49. Trustee's reply brief.
50. Petitioners' supplemental brief in support of motion to dismiss.
51. Cost bond on appeal to the Court of Appeals for the Ninth Circuit.
52. Notice of Appeal to the Court of Appeals for the Ninth Circuit.
53. Form of order denying motion to vacate adjudication, presented by J. Lael Simmons, attorney for R. D. Tembreull and Albert A. Mayer—not signed.
54. Form of order denying motion to dismiss, presented by Nelson R. Anderson, attorney for Trustee—not signed.



In the District Court of the United States, for the  
Western District of Washington,  
Northern Division

In Bankruptcy—No. 38376

In the Matter of:

McHUGH TRUCKING COMPANY, a limited  
partnership, and JAMES E. McHUGH, Gen-  
eral Partner.

HEARING ON ORDER TO SHOW CAUSE

Seattle, Washington, January 12, 1951

Be It Remembered that on this 12th day of Jan-  
uary, 1951, at the hour of 2:00 o'clock p.m., at 600  
United States Court House, Seattle, Washington,  
the above entitled matter came on for hearing, pur-  
suant to notice and subpena, before the Honorable  
Van C. Griffin, Referee in Bankruptcy.

Appearances: Nelson R. Anderson, Esq., appear-  
ing for William J. Steinert, Esq., Trustee. J. Lael  
Simmons, Esq., (of Messrs. Simmons & McCann) ap-  
pearing for Messrs. Albert A. Mayer and Richard  
D. Tembreull, respondents. J. Vernon Clemans, Esq.,  
appearing for James E. McHugh. Wallace Aiken,  
Esq., appearing for Seattle First National Bank,  
Main Branch.

Thereupon, the following proceedings were had  
and testimony given, to-wit: [1\*]

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\* Page numbering appearing at top of page of original Reporter's  
Transcript of Record.

PROCEEDINGS

The Referee: The bankruptcy Court will come to order.

The trustee has filed a petition, outlining certain facts, and based upon that petition and the record herein, the Referee entered an order on the 13th day of December, 1950, directing that Albert A. Mayer and R. D. Tembreull appear before the undersigned Referee in Bankruptcy, at a certain time and place, which has been determined as this time, for examination, and to show cause, if any, why they and each of them should not be held and declared to be general partners with James McHugh, Bankrupt, in that certain partnership known as the McHugh Trucking Company; and, further, why they should not be required to file schedules in bankruptcy, as required by the Bankruptcy Act, and thereafter file petitions in bankruptcy.

The Referee entered an order and issued subpoenas for them to appear at this time for examination.

I would like to take the appearances at this time.

Mr. Simmons: Mr. McCann filed a special appearance for Mr. Tembreull and Mr. Mayer, but it seems I am appearing special for Mr. Mayer and Mr. Tembreull——

The Referee: It was signed by you and Mr. McCann, for you to appear specially for Mr. Tembreull and Mr. Mayer, and that appearance has been noted.

About these subpoenas—it has occurred to me that

you might want to call these short witnesses first, and you may proceed to do so.

Mr. Anderson: I would like to call the representative of the Seattle First National Bank.

Mr. Simmons: Let the record show at this time the Respondents object to this proceeding—this hearing—and particularly to the interrogation of this witness, until such time as it is shown that the trustee in this matter represents a creditor who extended credit to this partnership on the representation and on the basis of the fact that Mayer and Tembreull were general partners. I believe there is no occasion for an inquiry into the liability of Mr. Tembreull or Mr. Mayer as general partners until and unless it be shown that someone now represented by the trustee in bankruptcy did extend credit based on the general liability of one or the other, or both of these partners.

The Referee: The Referee entertains a different concept of the law. The objection will be over-ruled. You may proceed, Mr. Anderson.

#### REGINALD F. GEARHEARD

being first duly sworn, was examined and testified as follows:

##### Direct Examination

Q. (By Mr. Anderson): Your name is? [4]

A. Reginald F. Gearheard.

Q. You are employed by the Seattle First National Bank? A. Yes, sir.

Q. What position do you hold with the bank?

A. Assistant vice-president in the Consumer Credit Department.

(Testimony of Reginald F. Gearheard.)

Q. You were subpena'd to bring books and records in the possession of the bank, relating to McHugh Trucking Company. Have you brought that material?      A. I believe I have.

Q. Would you first produce the signature card the bank had in its possession?

Mr. Simmons: May I interrogate preliminarily, Your Honor?

The Referee: Well, Mr. Simmons, the trustee has the right to examine any witness with respect to business done with the bank, independent of your position; they have the right to make this examination and I wanted to take this examination now, subject, of course, to your objection as it may apply to your clients, so that this could get under way. We will reserve your objection.

Q. (By Mr. Anderson): Do you have the signature card?      A. Yes.

Mr. Anderson: May we have the right to substitute a photostatic copy? [5]

Mr. Simmons: No objection, that is, to the substitution.

The Referee: This will be marked Trustee's Exhibit No. 1.

(Document referred to was marked for identification as Trustee's Exhibit No. 1)

Q. (By Mr. Anderson): Showing you what the Referee has marked as Trustee's Exhibit No. 1, is that the signature card of the McHugh Trucking Company at the Seattle First National Bank?

A. Yes, it is.

(Testimony of Reginald F. Gearheard.)

Mr. Anderson: I offer this in evidence.

Mr. Simmons: And I object to it as incompetent, immaterial and irrelevant.

Mr. Anderson: I offer in evidence Trustee's Exhibit No. 1.

The Referee: It will be admitted.

(Document heretofore marked Trustee's Exhibit No. 1 for identification, was received in evidence.)

Q. (By Mr. Anderson): Have you with you any cancelled checks of this company?      A. No, sir.

Q. Have you with you any notes given to your bank by McHugh Trucking Company? [6]

A. The notes, I believe, were entered by the attorney some time ago.

Q. Were those notes put in evidence in your suit?

Mr. Aiken: They are attached to claimant's claim, and which are on file with the petition.

A. We have copies here.

The Referee: Let me see them.

(The Referee examines documents)

The Referee: The law provides that you present the originals, but the Referee is satisfied that this is a copy of the original, and therefore will allow you to substitute a copy.

Mr. Simmons: What I am saying, I am not objecting to it because it is a copy——

The Referee: All right, that will dispose of your objection.



(Testimony of Reginald F. Gearheard.)

Q. (By Mr. Anderson): Your bank filed a claim in the court in this same bank matter?

A. Yes, sir.

Q. And to your claim was attached copies of the notes given by Albert A. Mayer, James E. McHugh, and D. Tembreull, doing business as James McHugh Trucking Company, and signed James McHugh, Partner, R. D. Tembreull, Partner, and Albert Mayer, Partner; the first one being dated September 29, 1948, for \$15,302.40? [7]

A. Yes, sir.

Q. And then your claim has another note attached to it, signed in the same fashion?

A. Yes.

Q. Also, your claim has attached to it a copy of a chattel mortgage dated the 29th day of September, 1948, and signed Albert A. Mayer, James McHugh, and R. D. Tembreull, Partners, doing business as McHugh Trucking Company; and also signed James F. McHugh, Partner, R. D. Tembreull, Partner, and Albert Mayer, Partner?

A. Yes, sir.

Q. This chattel mortgage was duly acknowledged by these three men? A. Yes, sir.

Q. And there was an affidavit attached, as well as the acknowledgment? A. Yes, sir.

Mr. Anderson: I offer this in evidence as Trustee's Exhibit No. 2.

Mr. Simmons: I will object, not because it is a copy, but because, in my opinion, it isn't the proper time, under my original statement.

(Testimony of Reginald F. Gearheard.)

The Referee: It will be considered as evidence. I won't take it out of the claim file; we will just consider it in evidence. [8]

Q. (By Mr. Anderson): Mr. Gearheard, do you know, of your own knowledge, who deposited money in this McHugh Trucking Company account?

A. No, I don't.

Q. Of your own knowledge, do you or do you not check on the accounts?

A. Well, I might say this: I am not a teller.

Q. You are not a teller, but in the course of your business as an employee of the bank, do these canceled checks come to your attention in any way at any time?      A. No, they don't.

Q. Did you bring some ledger sheets along with you?      A. I did.

Q. Did you make sufficient comparison of a number of ledger sheets of the Seattle First National Bank to McHugh Trucking Company with the originals in your hand, so that you could say they are your originals?      A. Yes.

Q. Also, did you look at certain canceled checks here to see whether those were checks drawn on or honored by your bank?

A. What was the question?

Q. The first question—are these ledger sheets put out by Seattle First National Bank and given to McHugh Trucking Company? [9]

A. Yes, they appear to be our forms.

Q. And the canceled checks were checks that were cashed by your bank?

(Testimony of Reginald F. Gearheard.)

A. Well, those I have looked at, are, yes, sir.

Q. Well, have you looked at them all on the front page? (hands canceled checks to witness)

Mr. Aiken: Is it true that the checks identified by the numbers 19-2 over 1250 are checks drawn on the main office?

The Witness: That is right.

Q. (By Mr. Anderson): Well, when those came back to your bank, you cashed them — honored them?

A. Yes. Do you want me to take the time to make comparison with the ledger sheets?

Q. No. From the appearance——

A. From their appearance, those appear to have been cashed by our bank. Do you want me to look at the rest of them?

Q. Go ahead. A. Yes, sir.

Mr. Anderson: I will offer in evidence ledger sheets from the Seattle First National Bank, opening date December 31, 1948, up to the month of January, 1949; then the month of January, 1949; another covering the month of February, 1949; another sheet covering [10] March, 1949; April, 1949; and May, 1949; together with canceled checks written on said account; all of said checks being signed McHugh Trucking Company, and below that name appears R. D. Tembreull, Albert A. Mayer, and below the last name, the address of 626 13th Ave. North.

I will offer this as Trustee's Exhibit No. 3.

(Testimony of Reginald F. Gearheard.)

(Whereupon, the documents referred to were marked Trustee's Exhibit No. 3 for identification.)

The Referee: It will be admitted.

(Whereupon, the documents previously marked Trustee's Exhibit No. 3 for identification, were received in evidence.)

Mr. Simmons: Object to as incompetent and irrelevant, not material to the issues, and as in my original statement.

Q. (By Mr. Anderson): Showing you a pink printed sheet, with the heading, "Combined authority and individual pledge for partnerships," addressed to Seattle First National bank, one being dated August 12, 1948; the other being a duplicate copy of it, I will ask you who signed the pink printed sheet?

A. Albert Mayer, James McHugh, and R. D. Tembreull.

Mr. Anderson: I will offer Trustee's 4 in evidence.

Mr. Simmons: Same objection. [11]

The Referee: Same ruling. It will be admitted.

(Whereupon, the documents referred to were marked for identification as Trustee's Exhibit No. 4, and received in evidence.)

Mr. Anderson: You may cross-examine.

#### Cross Examination

Q. (By Mr. Simmons): Mr. Gearheard, did

(Testimony of Reginald F. Gearheard.)

your bank ever extend any credit to McHugh Trucking Company, solely?

A. We made loans to McHugh Trucking Company.

Q. Solely? I mean, alone—by itself?

A. I don't think I understand your question.

Q. Well, isn't it a fact that when credit was asked of the bank, you insisted on the liability of Mr. Tembreull and Mr. Mayer before you would extend credit?

A. Well, if you put it that way, yes.

Q. Does your bank carry any kind of card, or any printed form just intended for use with limited partnerships?

A. I don't know whether we do or not. I can't answer that.

Q. As far as you know, the forms you have are for partnerships, without distinction between general and limited?

A. That is right, yes, sir.

Q. And so far as you know, the credit extended to McHugh Trucking Company was on the basis of the signatures of Mr. Mayer, Mr. Tembreull and Mr. McHugh. [12]

A. That is right.

Q. The fact of whether or not this was a general, or a limited partnership didn't enter into your consideration?

A. No, sir.

Q. Now, since the petitioner was adjudged bankrupt, is it not true that you have sued Mr. Mayer and Mr. Tembreull outside the bankruptcy and obtained judgment against them on the signatures which they gave you?

(Testimony of Reginald F. Gearheard.)

A. I will say that a suit has been commenced.

Q. You don't know whether or not judgment has been entered?

A. I don't know whether it has been entered or not.

Q. In other words, it was independent of the bankruptcy?      A. Yes, sir.

Q. And you have had considerable negotiations with Mr. Tembreull and Mr. Mayer to see if you could get that account liquidated?

A. Yes, sir.

Q. Without reference to the bankruptcy?

A. That is right.

Q. Now, Mr. Gearheard, do you know of anybody inquiring at your bank to examine these particular documents that have been introduced into evidence, with a view of extending credit to McHugh Trucking Company?

A. You mean, recently—in the last few days?

Q. Nobody has extended credit in the last few days. [13]

A. I was just trying to understand your question.

Q. Maybe I could make the question a little more clear. Are you aware of the existence of any creditors of McHugh Trucking Company, or Mr. Mayer or Mr. Tembreull, who became such because they examined the papers you had?

Mr. Anderson: I think that is irrelevant and immaterial.

(Testimony of Reginald F. Gearheard.)

Q. (By Mr. Simmons): Do you understand the question? A. No.

Q. You took a combination authority and individual pledge agreement for partnerships—you took a form like that and you had Messrs. Mayer and Tembreull and McHugh sign that form?

A. Yes, sir.

Q. Now, do you know of anybody who came and said, "I have been asked to extend credit to McHugh Trucking Company and I want to know if these three men are general partners?"

A. No, not to my knowledge.

Q. You took these documents purely for your own purposes?

A. If you are speaking of the combined authority card, yes.

Q. And the chattel mortgage and signature card? A. Yes, sir.

Q. You didn't publish them to anyone? [14]

A. No, sir. Outside of the filing of the chattel mortgage.

Q. Except for the filing? A. Yes, sir.

Q. As far as you know, the filing of the chattel mortgage did not bring inquiries to your office?

A. As far as I know, it did not.

Mr. Simmons: I think that is all.

The Referee: Any other questions?

(No response.)

The Referee: If there are no objections, he may be excused. You may step down, Mr. Gearheard.

(Witness excused)

Mr. Nelson: I will offer the two so-called limited partnership agreement of McHugh Trucking Company—of McHugh, Mayer and Tembreull, bearing the date of acknowledgment of June 23, 1948, and filed with the county clerk of King County on the 2nd day of November, 1950.

The Referee: Any objections.

Mr. Simmons: I have no objection to that, but it was filed in April.

The Referee: It is a certified copy, and it will be admitted.

Mr. Nelson: I want to know when it was filed in April, Mr. Simmons.

Mr. Simmons: On April 20, 1949. [15]

Mr. Anderson: I want to amend my statement. It was filed on April 20, 1949.

The Referee: Mr. Simmons, if you wish to have an appearance, you may do so, and I will pass on that.

Mr. Simmons: This special appearance might be—well, I might appear a little awkward in arguing that. Mr. McCann had some theory you had no jurisdiction unless it were adjudged that this is a limited partnership.

The Referee: Even so, I would have the right to examine them.

Mr. Simmons: I don't see at this time any particular merit in arguing a special appearance.

The Referee: It will be over-ruled. You can, if you wish to, make an oral reply or statement on what your position is as to the petition and order to show cause why they shouldn't file schedules.



You haven't replied to my written request, and we will proceed with the examination.

Mr. Simmons: I think that probably, for the purpose of the record, I will make a statement now.

The Referee: It will help me if you will do so.

Mr. Simmons: Perhaps in doing so, I should take the petition itself and go through it paragraph by paragraph. I don't wish to question Judge Steinert's [16] qualifications, as set out in Paragraph 1.

The Referee: You will waive that?

Mr. Simmons: Yes. And I will concede that, as alleged in Paragraph 2, that McHugh, Mayer and Tembreull entered into a purported limited partnership agreement. I will admit the additional allegations in Paragraph 2 to the effect that McHugh Trucking Company, a limited partnership, was adjudged bankrupt, and that James T. McHugh was adjudged bankrupt, and that the adjudication was based upon the petition filed by Albert Mayer and R. D. Tembreull and J. Lael Simmons, plus the testimony given in support of that petition.

I deny that Albert Mayer and R. D. Tembreull and James McHugh were general partners or that each of the partners exercised equal control over the business of the partnership.

The Referee: Each of the partners exercised full control?

Mr. Simmons: We deny that: Well, maybe I shouldn't deny it for all purposes. It depends on the definition of the word "control", in the sense that one was a manager and the others may have given aid in certain specific instances, but I think for the purpose of this, I will deny they exercised control.

I will admit a filing of a limited partnership on the 20th day of April, 1949. I deny that the indebtedness was contracted prior to that day—all of it.

I have no information upon which to base the truth or falsity of the allegations in Paragraph 3 pertaining to a 1945 International truck and trailer, and the appraisal thereof, and the condition thereof.

The same applies to Paragraph 4. I haven't sufficient information to qualify the truth or falsity of the allegations at this time, and therefore deny all allegations contained in it.

I suppose we just nolo contendere on Paragraphs 5—

The Referee: And No. 6, also?

Mr. Simmons: Yes, sir. And as to 7, we will here and now reply to that. We deny we should file any schedules.

Now, we might go further and state to the court that, if my memory serves me rightly at this time, that during the year 1945, of the session of the legislature in 1945, they adopted what is known as the Uniform Limited Partnership Act in the state of Washington; that pursuant to that Uniform Limited Partnership Act, the parties, Mayer and Tembreull, entered into a partnership arrangement with James McHugh, who at that time was the holder, or the alleged holder, of certain permits to operate trucks in the trucking business. [18]

We also allege that in entering into this partnership it was specifically agreed by and between the parties that it was the intention of Mr. Mayer and

Mr. Tembreull that they should not be general partners; that they were merely contributing capital. We further allege that in the course of the operations of the McHugh Trucking Company, certain creditors required, before they would extend credit to McHugh or the McHugh Trucking Company, that Mayer and Tembreull lend the credit of their names to the debt; and that in a number of such instances they did lend the benefit of their credit to the partnership enterprise, in some instances signing a conditional sales contract; in other instances, signing a chattel mortgage or note.

We allege there is no creditor who extended credit to the partnership based on the claim or upon the fact that Mayer or Tembreull were general partners, who has not, separately from the bankruptcy proceeding, in the Superior Court of the State of Washington, attempted to establish liability of Mayer and Tembreull. There are a number of those cases still pending.

We further allege it was the intent of the legislature, and should be the intent of the court, that when one partner puts money into this limited partnership venture, he occupies a position tantamount to that of [19] a stockholder of the company, insofar as his liability is concerned.

In this particular instance, the trustee does not represent anybody extending credit based on inquiry into the facts and determination of whether or not Mr. Mayer and Mr. Tembreull were general or limited partners.

The Referee: You may proceed, Mr. Anderson.

## ALBERT A. MAYER

being first duly sworn, was examined and testified as follows:

## Direct Examination

Q. (By Mr. Anderson): Will you state your name?           A. Albert A. Mayer.

Q. And your address?           A. 626 13th North.

Mr. Simmons: Counsel, before you get into this——

Your Honor, I take it there is no need for me to repeat my objections on the ground of my original theory, and I think I have made my original theory clear to the Court that until it has been made to appear to the satisfaction of the Court that there is probable cause, so to speak, that the trustee represents someone who extended credit in reliance upon, or the signatures, or the association of these men—Mayer or Tembreull, or both of them as general partners, that this hearing is [20] premature, and with that understanding, I will not continually object to the testimony, and we can proceed faster.

The Referee: I will let that be a part of your objection; but there is no secret I don't concur with you, Mr. Simmons.

Q. (By Mr. Anderson): Now, Mr. Mayer, when did McHugh Trucking Company open an account with the Seattle First National Bank?

A. That I couldn't tell you.

Q. Could you refresh your recollection by looking at the signature card, marked Trustee's Exhibit No. 1?

A. You mean, as to the beginning of this?

(Testimony of Albert A. Mayer.)

Q. Yes, when did they open the account?

A. I don't remember, to be honest with you, but it was some time in 1948.

Q. Looking at the date stamped on it, of June 26, 1948—on Trustee's Exhibit No. 1, it would appear to you that it was opened on or about that date?

A. That is probably right.

Q. Is that your signature on Trustee's No. 1?

A. Yes, sir.

Q. Is that the signature of R. D. Tembreull on Trustee's Exhibit No. 1?

A. Well, I wouldn't like to verify that. [21]

Q. I asked you if that is his signature; don't you know his signature?

A. I would imagine it was, but I wouldn't swear to it.

Mr. Simmons: Let me say to counsel that there is no use bothering Mr. Mayer on that when it can be clarified by actual testimony.

Q. (By Mr. Anderson): Will you look at the canceled checks contained in Trustee's Exhibit No. 3? Are those your signatures? A. Yes.

Q. And do they also bear the signature of R. D. Tembreull?

A. Yes, roughly glancing through, I would say yes.

Q. Who opened that account, on or about July 26, 1948?

A. I presume both of us did—I don't just recall.

Q. And the both of you signed the checks written on the account?

(Testimony of Albert A. Mayer.)

Mr. Simmons: We will admit that, counsel.

Q. (By Mr. Anderson): Do you have any other bank accounts in the city of Seattle?

A. In the city of Seattle? No.

Q. Do you have any bank accounts in Yakima?

A. Yes, sir.

Q. Who signed the checks drawn on the Yakima bank?

A. Well, I think the majority were signed by James McHugh, and I presume that for convenience, we might have [22] signed a few of them.

Q. You and Mr. Tembreull had the right to sign checks on the Yakima bank in the event he was out of town?

A. Yes.

Q. Who started keeping the books for this concern?

A. I can't remember.

Q. Did Mr. Tembreull, at first, keep the books?

A. Just notes—mainly notes. There was an accountant but I can't recall his name—

Mr. Simmons: Let him get the files.

The Witness: I am going only from recollection.

Mr. Simmons: In order to get this witness straightened out, my recollection is that Mrs. McHugh started, and probably Mr. Tembreull followed, but from the formation of the organization, I believe an accountant by the name of Salonka took over, and after that—

The Witness: Salonka was the first and I think Bruenn was the second.

Mr. Anderson: I thought from your discussion that some other accountant came ahead of this man—

(Testimony of Albert A. Mayer.)

Mr. Simmons: I think Salonka was the first man who was really an accountant who followed Mrs. McHugh—he took the books over and then a fellow named Bruenn took over.

Mr. Anderson: Are you willing to stipulate that [23] Mrs. McHugh kept some books; next Mr. Tembreull took over for a short time; and then they got an accountant by the name of Salonka?

Mr. Tembreull: Well, I don't know—after Mrs. McHugh, all I wanted was to get some notes for use with my own books, but I did turn them all over to Salonka when he started taking care of the books.

Q. (By Mr. Anderson): Who employed the accountant, Mr. Salonka?           A. We did.

Q. Who are "we"?

A. Tembreull and myself.

Q. Salonka is a Seattle man?           A. Yes, sir.

Q. During the operation of this business you and Mr. Tembreull were in Seattle and McHugh was in Yakima?

A. He was all over—out of Yakima—in and out.

Q. He drove a truck?

A. Part of the time, yes.

Q. Did you drive a truck at any time?

A. I might have made a trip or so, but that would be all.

Q. Did Mr. Tembruell make any trips with the truck?

A. I couldn't say as to what he did. You are speaking of Mr. Tembruell?

Q. Yes. [24]           A. Well, I couldn't say.

(Testimony of Albert A. Mayer.)

Q. What did your equipment consist of that was used in the conduct of this business?

A. What it consisted of?

Q. Yes.

A. I think we had four or five tractors and combined with open trailers.

Q. International, Reo and Federal?

A. Yes.

Q. Who bought those?

A. McHugh Trucking Company.

Q. Did you buy them?

A. No, McHugh Trucking Company bought them.

Q. How did you go about purchasing them—did you have a say in that?      A. Sure.

Q. And did Mr. Tembreull have a say in the purchase of this equipment?      A. Yes.

Q. Who did you buy it from—who was it bought from?      A. Different dealers.

Q. Well, from the Philippine Produce Company?      A. They negotiated a deal—

Q. Did you, personally, and Mr. Tembreull, personally, give a note to this Philippine Produce Company? [25]

A. Yes, we were called into that deal.

Q. Then you personally executed a chattel mortgage on this material to the Philippine Produce Company?

Mr. Simmons: Your Honor, we are getting into a lot of detail about which we can stipulate.

Mr. Anderson: All right, you stipulate.



(Testimony of Albert A. Mayer.)

Mr. Simmons: We will stipulate that McHugh Trucking Company entered into an arrangement with the Philippine Produce Company at Wapato, and in the course of that deal, Mr. Mayer and Mr. Tembreull were required to and did sign, in addition to the McHugh Trucking Company, for the payment of the purchase price, and for performance of the contract. I believe, if my memory serves me right, that it was a contract and not a mortgage.

Mr. Anderson: That is correct.

Mr. Simmons: I think it was a conditional sales contract; that the Philippine Produce Company would furnish for them, hauling, and the men would buy this equipment and pay for it, and they are each personally liable, if the Philippine Produce Company didn't break its contract before the liability was established.

That is our only defense in that action, which was an action brought before the Yakima courts—the superior court—to establish that liability at this time. [26] That action is still pending.

Mr. Anderson: As long as we are stipulating, James W. Murray brought suit against these three men?

Mr. Simmons: Yes.

Mr. Anderson: He did?

Mr. Simmons: Yes, No. 411610; in which it was alleged that these three men were general partners, doing business under the name and style of McHugh Trucking Company, and I think the answer admitted that. Will you stipulate that?

(Testimony of Albert A. Mayer.)

Mr. Simmons: Well, I don't know whether I will or not. I don't think it makes any material difference. That action is based on a written instrument, and if any liability attached to that, it must be upon that written instrument, which was signed by all three of them.

Mr. Anderson: What agreement is that?

Mr. Simmons: It relates to the furnishing by Mr. J. W. Murray of money to the sum of, if my recollection serves me correctly, \$5,000 towards the purchase of a new truck which, when purchased, would be combined with the other trucks operated by McHugh Trucking Company, for the purpose of operating those trucks in the hauling business for revenue; and that the revenue, when and if received, should after payment of the overhead, [27] be divided between Mr. Murray and McHugh Trucking Company. Murray claims there was a profit made and he didn't get his share, and McHugh Trucking Company claims there was no profit made of which he didn't get his share.

Mr. Anderson: All right.

Q. (By Mr. Anderson): Mr. Mayer, who are the drivers of the trucks; who talks to them; who employed them?

A. I don't believe I ever employed a single one, but I have talked to them.

Q. Did you ever fire any of them?

A. At least, I never wrote out a check for that.

Q. Did you ever discharge one?

A. I leave that to Jim McHugh to answer. I don't believe I ever did.

(Testimony of Albert A. Mayer.)

Q. Did you solicit any business for the concern?

A. Some business; very little.

Q. Did Mr. Tembreull solicit some business for the firm, that you know of?

A. Not that I know of.

Q. Did you appear on the payroll of this concern?

A. I did not.

Q. You withdrew sums of money, did you not?

A. Not to my recollection, for wages. I don't think I drew anything. [28]

Q. What are these checks which you have drawn in your own favor, Mr. Mayer?

Mr. Simmons: You are assuming there are some?

Mr. Anderson: Yes, I am assuming there are.

Mr. Simmons: Have you got some of them?

Mr. Anderson: I have several books of them.

You cross-examine and tell me how many checks there are.

#### Cross-Examination

Q. (By Mr. Simmons): I will ask you if it isn't a fact that after the McHugh Trucking Company got under way, you were asked, from time to time, to advance additional capital, Isn't that true?

A. Yes, sir.

Q. I will ask you whether or not, prior to the 23rd of June, 1948, if you had conversations with Messrs. McHugh and Tembreull, leading up to the preparation and signing of a certificate of limited partnership, such as has been filed here as Trustee's No. 3?

A. Yes.

(Testimony of Albert A. Mayer.)

Q. Do you recall any of those conversations?

(No response)

Q. Do you recall any of the conversations when that was executed?

A. Well, what I am leading up to—I have known Jim McHugh [29] for a long time——

Mr. Anderson: I am going to object if any conversation whatsoever that took place——

The Referee: His memory seems to be very poor. What do you remember about that?

The Witness: I remember when we entered into the deal, I told Jim McHugh at the time, "O.K., we will put in \$1500. apiece, and we will start this limited partnership, but I don't want any part of the management".

The Referee: I want to hear this, and what these checks are for. He doesn't remember a thing about that.

Q. (By Mr. Simmons): Do you remember now?

A. (No response.)

Mr. Anderson: You don't know what the checks were for, and you were in the business?

The Witness: Well, this is a long time ago.

The Referee: I will ask him again.

The Witness: I know some of them.

Mr. Simmons: I am objecting to the attitude of the Court.

The Witness: That was a payment made on trucks.

The Referee: Did they pay anything to you?

The Witness: They didn't pay anything to me.

(Testimony of Albert A. Mayer.)

Q. (By Mr. Simmons): If there are checks there payable in [30] your behalf—

The Referee: Don't lead the witness; let him testify.

Q. (By Mr. Simmons): Well, state if there are checks there, what they would be for?

A. These are all of them.

Q. Are any of them drawn payable to you?

The Referee: Where are they? Are they there?

Q. (By Mr. Simmons): In other words, if you didn't get checks for wages, what did you get them for, if you got them?

A. There is one in here—repayment on truck and trailer, \$406.00.

Q. Who is it payable to?

The Referee: What was that?

The Witness: For repayment of loan. And here is on one for \$15.00 made out to me. I don't recall what it is unless it was for cash advanced.

Q. Here is a stub dated 3/1/49, A. A. Moore, repay loan advanced on trip to Yelm, Washington.

A. Yes, that is a trip that he made.

Q. What are the others? Do you have any more? Did you have a man named Dicket?

A. Yes, and here is one for \$9.97, repayment of loan; and that is the extent of them. [31]

The Referee: How about this repayment of loan; was that a capital investment, or additional capital?

The Witness: No, the capital investment was put in at one time. This was an additional loan—this was afterwards.

(Testimony of Albert A. Mayer.)

The Referee: Were you at the office of the company every day, Mr. Mayer?

The Witness: No.

The Referee: When were you at the office?

The Witness: We didn't have any office.

The Referee: Well, when did you do business?

The Witness: Whenever the truck came into town, we would load the truck. Headquarters was supposed to be where Jim McHugh was, but if we could lend any assistance, we would do so.

Q. (By Mr. Simmons): From time to time did you advance money as an accommodation?

The Referee: Don't put the words in his mouth.

A. That is just exactly what I did. We loaned money to take care of the bills.

The Referee: You drew all the checks?

The Witness: No.

The Referee: Who did draw the checks?

The Witness: James McHugh did.

The Referee: That is what we are talking [32] about. You and Mr. Tembreull drew some checks on this particular account?

The Witness: Yes, sir, but there was more put in there before——

The Referee: Well, before you drew a check, you had to say what it was for, and you drew money?

The Witness: Yes, sir.

The Referee: Did you solicit business?

The Witness: No.

The Referee: None.

The Witness: I think I could say——

The Referee: Well, anybody could say, but did

(Testimony of Albert A. Mayer.)

you solicit any business for McHugh Trucking Company?

The Witness: No.

The Referee: Never did?

The Witness: It might have been once or twice, but not as a business. We weren't interested. This was just an accommodation; if the truck would come in, we would lend assistance, but I did not want to interfere in the company—it was McHugh's baby. I told him I knew nothing about trucks, when we went into the organization — nothing about trucks, and he was to handle the truckers.

The Referee: Proceed with your examination.

Q. (By Mr. Simmons): How much money did you put into this [33] deal, besides the original \$1,500, for which you were never repaid?

A. I would hate to make any attempt to say how much money that was.

Q. Was it the amount set forth in the petition for adjudication of bankruptcy?

A. That is right.

Q. I will ask you, did you ever get any money back as dividends, or as interest on your investment?

A. No.

The Referee: Before we leave that, I would like an itemization of the \$11,000 you say you put in there.

Mr. Simmons: That isn't a fair question.

The Referee: I know it. I will give him two weeks to do it, but he said he loaned them money. Do you want to give me the details?

(Testimony of Albert A. Mayer.)

Mr. Simmons: We will be glad to furnish the Court with an itemization of that.

The Referee: I want to know about these checks.

Mr. Simmons: Those would not be, Your Honor, that amount. That amount is funds advanced, or for which they were liable, which is not drawn out.

The Referee: For which they are liable? They are liable for everything, according to my theory.

Mr. Simmons: The Court has practically made a [34] ruling; that being true, I think maybe it is premature and I think the Court, before making a ruling, ought to hear a little bit about the law on the subject.

The Referee: I want the facts first, and I could issue the show cause order. He testified these men run this business, solicited funds, paid help——

Mr. Simmons: He testified——

The Referee: On that testimony, I could issue the show cause order, but what I want to know on that \$11,000 is—is it wages, wholly; or is it money paid out for help while running the business? But whatever it is, I would like to know what it is for.

Is it money he paid out on behalf of the company?

Mr. Simmons: Yes.

The Referee: All right. Not in direct loans?

Mr. Simmons: Well it was treated as an advance to the company, to be repaid.

The Referee: The point is, he would have to be actively in control of the company to be in a position to pay out this money.

Mr. Simmons: No, getting behind is the term;



(Testimony of Albert A. Mayer.)

you try to keep him from getting behind and here these fellows, month after month, pour in money in the hopes of getting a return, and there is no return; and you finally get to the point where they can't even get their [35] own money back, or get hold of more, so that they were driven to the bankruptcy court to stop the stream from washing their credit out to sea.

The Referee: But where a man is going to pay out some \$11,000 or more—before he does that, somebody has got to make some investigation, and that argues substantial control, in my opinion.

Mr. Simmons: Well, I might have a son who is a profligate, and I can pay out money to keep him out of trouble, but still I can't control him.

The Referee: All right. Proceed.

Q. (By Mr. Simmons): Mr. Mayer, I will ask you if the funds which you advanced from time to time in behalf of the company were required to keep the company in business? A. That is right.

The Referee: How do you know that?

The Witness: Well, because the payrolls weren't being met and the payments weren't made.

The Referee: You knew that? How?

The Witness: Well, because I would get notifications coming through the mail, or by the drivers.

The Referee: By whom?

The Witness: By the drivers, or by notifications coming in through the mail. [36]

The Referee: Did you talk those matters over with Mr. McHugh?

(Testimony of Albert A. Mayer.)

The Witness: Many times.

Q. (By Mr. Simmons): After this company proceeded in the hauling business, did McHugh live in Seattle or at Yakima?

A. To begin with, he lived in Seattle, at some hotel.

Q. Do you know when he moved over to Yakima?

A. Just shortly after starting—a month or six weeks.

Q. I will ask you if he, at that time, or any subsequent time, demanded the books and records be kept at Yakima?

A. He did later on, but just exactly when, I don't recall, but he did.

Q. I will ask you if, subsequent to that time, you were able to get any statement as to the financial condition of the concern?

A. Well, we get that by driving over and talking things over.

Q. Were you furnished with a statement by McHugh from time to time?      A. No.

Q. Did you ask for it?

A. Yes, we would have liked to have had a statement, but weren't able to get it.

Q. Why weren't you able to get it? [37]

A. The whole darned thing wasn't set up properly.

Q. Why didn't yet set it up properly, if you knew it wasn't set up properly?

A. As I said, I don't know anything about trucking, and I think I know less today.

(Testimony of Albert A. Mayer.)

Q. Well, was it up to you to set it up properly?

A. No, it wasn't. We put in the investment, anticipating that McHugh knew the business—knew how to run it. We had all the confidence in the world in him, to begin with.

Q. Did you ever have occasion to ask McHugh to do something—anything connected with the operation, which he refused to do?

A. Oh, I couldn't say a direct refusal—it just never happened. If we asked him to do something, he never directly refused—it just didn't happen.

Q. Did you ever ask him to fire anybody?

A. I believe on one occasion. That happened when a guy was drinking, and he asked us how we felt about it; that is how that happened to come up.

Q. Did he always do what you recommended?

A. Well, in managing the trucking end, he did practically as he seen fit—in the operation of the trucks, practically as he seen fit; except for one instance when we had a truck up here for him; that is the only instance [38] in which we had anything to do with them.

Q. When did you first learn your trucking company business was going in the hole, or falling behind financially?

A. Well, there is always a lot of accounts out, and some of them uncollectible; still, there wasn't any time that the bills wasn't being met, but we had to come to the conclusion, without the anticipation of the uncollected accounts, we nevertheless found

(Testimony of Albert A. Mayer.)

out a short time before—in 1949—that we just couldn't go no farther; that is, we couldn't.

Q. You had been requested to come to the aid of the trucking company?

A. Well, the drivers would come over here—they would have to come over here for their pay, and when payments on the trucks and trailers come due.

Q. Did McHugh ever ask you or tell you about them?

A. At times; but he made a lot of them himself.

Q. Why did the company have an account in Seattle and one in Yakima?

A. Well, because of the payments to be made over there—labor, etc., and there is a lot of scattered industry over there—and he wanted his own account.

Q. Why did you maintain an account in Seattle?

A. That was in Seattle more for convenience, to begin with.

Q. Do you know of any general creditor, or any creditor, [39] rather, of this partnership—I suppose I should classify as a general creditor, myself—and when I say that, I mean somebody without a mortgage or contract—do you know of any such who extended credit to you individually or because you were a member of the firm, that hasn't been paid or isn't looking to you for payment, by lawsuit or otherwise?

A. Only from what I have heard, but not at the time of those contracts—I did not know that.

Q. Did you advise your creditors from time to

(Testimony of Albert A. Mayer.)

time—that is, the creditors of McHugh Trucking Company, when they would contact you, what the nature of the company was?

A. I did, yes, towards the last.

Q. When you say, “towards the last”—are there any creditors now who extended credit as though to you, without knowing that you were a limited partner?

A. Well, I don't know as that question ever came up, outside of Eckert Automotive.

Q. Do you know of any creditor of the McHugh Trucking Company, whose account was incurred subsequent to the 20th day of April, 1949, or rather, prior to the 20th day of April, 1949, who incurred that account in reliance upon your being a general partner, who has not been paid or who has not sued you in the superior court for payment? [40]

A. Well, I don't think any suit has been brought directly naming me as a general partner, if that is what you meant.

Q. No. Do you know what a general creditor is?

A. Yes.

Q. That is a creditor that just looks to someone to pay their debt, without having any security such as a mortgage or conditional sales contract or some such security under which the creditor could have recourse. Do you know of any such creditors of McHugh Trucking Company who extended credit to McHugh Trucking Company prior to the 20th day of April, 1949, whom you would classify as a general creditor?

(Testimony of Albert A. Mayer.)

A. In other words, that is someone looking to or depending on me for payment?

Q. Yes.

A. No, I don't, outside the contract at the bank and the Philippine Produce Co.

Q. The Seattle First National Bank has a chattel mortgage and the Philippine Produce Company has a conditional sales contract?

A. Yes, sir. Outside of those, I don't know of anybody.

Q. Why did you sign the mortgage down at the Seattle First National Bank?

A. Well, because they wouldn't sell McHugh the truck, by [41] himself—or rather, they wouldn't take the mortgage, so that we again came to the assistance of the company and *obliged* ourselves for that amount.

Q. You have been sued for the default on that by the bank for the unpaid balance of the note?

A. That is right.

Q. And you have been sued by the Philippine Produce Company for the unpaid balance of their note?

A. That is right.

Mr. Simmons: I think that is all. Perhaps the Court has some questions.

The Referee: You started business about?

The Witness: The 23rd of June, 1948, I believe. Approximately that.

The Referee: This document—Exhibit 1—shows you opened the bank account July 26, 1948, so that it was about the first part of your business?

(Testimony of Albert A. Mayer.)

The Witness: Yes, sir.

The Referee: And then, the time you ceased to do business and filed the petition—well, I don't have the date of filing, but it was approximately April, 1950, or March. I think it was adjudged in March, 1950. That is, according to the schedule here.

The Witness: I think the petition was filed on the 22nd of January. ]42]

Q. The Referee: These accounts here—do you know when they were incurred? Can you tell?

The Witness: I know some of them, but I don't know all.

The Referee: Some of them were incurred before April, 1949?

The Witness: I know the first one—the Philippine Produce Company is.

The Referee: In 1948.

Mr. Simmons: That is a secured account.

The Witness: Here is a lot of these I don't know anything about at all, and here are some I do recognize.

The Referee: Give me your best recollection of how you arrived at this figure of \$11,611.19?

The Witness: How I arrived at it?

The Referee: Yes. You wrote it down—you must have arrived at it somehow.

The Witness: Offhand it is just too hard to say, without having the facts before me.

The Referee: Don't you know the method by which you arrived at this figure?

The Witness: That is the actual figure.

(Testimony of Albert A. Mayer.)

The Referee: Well, did you have a note for it—  
did you ever have a note for it?

The Witness: Have any note for it? No. [43]

The Referee: Do you have a note now?

The Witness: No.

The Referee: Well, do you have any knowledge  
of how you arrived at the figure?

The Witness: Yes, I could say that I will be able.

The Referee: And the method by which?

The Witness: Just by checking up and making  
a report.

The Referee: Did you pay the money to McHugh  
Trucking Company by your personal check?

The Witness: A lot of it, yes.

The Referee: Most of it?

The Witness: The greater share of it, yes.

The Referee: Was that greater share called that  
\$11,000?

The Witness: What I am trying to emphasize is  
that \$11,000 isn't paid——

The Referee: That isn't paid?

The Witness: I will leave that to the accountant  
to explain, and if I need to be here, I will certainly  
have——

The Referee: Counsel, we are to think of that  
as the overhead figure for which he will be liable?

Mr. Simmons: Mr. Judge Black ruled he was a  
creditor. [44]

The Referee: But from what you say that arose  
partly from the notes he signed, and the company  
didn't owe both of them.



(Testimony of Albert A. Mayer.)

Mr. Simmons: That is a volunteer assumption on——

The Referee: I don't know how you arrived at that. I don't know any of the details. It is quite a sum of money and I wish to understand how it was arrived at.

Then there is this \$26.00 item he never brought up.

Mr. Simmons: Well, as I recall that, they sued McHugh Trucking Company for so much money and McHugh Trucking Company didn't have any money, so that in order to keep the trucks moving, Mayer and Tembreull paid the repair bills they had, not as their own indebtedness, and adding the \$2200 to some other indebtedness, and dividing by two, they each contributed 50%.

The Referee: That is why I wrote that order, so that I could look at the debts to see if they were controlling the company—that is the point I am making.

Mr. Simmons: Wouldn't that become involved only under the circumstances if this trustee had a dividend to declare?

The Referee: Let's not worry about that. That is all. Call your next witness.

Mr. Anderson: Mr. Tembreull, will you take the stand? [45]

## R. D. TEMBREULL

being first duly sworn, was examined and testified as follows:

## Direct Examination

Q. (By Mr. Anderson): Mr. Tembreull, going over the same matters—you gave the bank the combined authority? A. Yes.

Q. I see that is marked Trustee's No. 2. You also gave the bank Trustee's No. 1—the signature card? A. Yes.

Q. If these are not all of them, at least they are some of the ledger sheets returned to you by the bank — referring to the bank ledger sheets and checks? A. Yes.

Q. And those are canceled checks of your concern, which were executed by you and Mr. Mayer, and run through the bank, and later returned to you? A. Yes.

Mr. Simmons: In order that the record may be clear on this point, my objection as stated previously, will also apply to this interrogation of Mr. Tembreull.

The Referee: All right.

Q. (By Mr. Anderson): Now, did you glance at some nine stubs of check books, and can you state whether those are stubs of checks which were written by Mayer and Tembreull? [46]

A. Yes, they are.

Mr. Anderson: I will offer them in evidence as Trustee's No. —

The Referee: Trustee's No. 4. They will be admitted.

(Testimony of R. D. Tembreull.)

(Whereupon, the documents above referred to were marked for identification as Trustee's Exhibit No. 4, and were received in evidence.)

Q. (By Mr. Anderson): Did you ever solicit any business for or on behalf of this concern?

A. I did not.

Q. You never went out to furnish any business for them?

A. There was a party I worked with whose wife was working at the Northwest Note & Bond, and I asked him to see his wife and have her find out if they could throw a little business to McHugh Trucking Company; if they would throw a little business to McHugh, it would be fine, but I never contacted Northwest Note & Bond.

Q. Who employed the accountants?

A. Through agreement with McHugh, Mr. Salonka was employed. He asked our advice, if he was trustworthy, and of course, Mr. Salonka had taken care of Mayer's books before; then McHugh took the books away from Salonka and brought them over to a person in Yakima.

Q. McHugh wasn't acquainted with Salonka in the beginning, [47] before he was employed?

A. To my knowledge, I don't think so.

Q. Were you acquainted with Salonka?

A. I think at one time, he made out an income tax statement, but I don't know.

Q. The fact is, you and Mr. Mayer sought out Mr. Salonka and asked him to audit the books and make up a statement?

(Testimony of R. D. Tembreull.)

A. The fact is, we weren't satisfied with the way McHugh was running the business and we asked to have a man who knew books take care of them; and he wanted advice on who would be a good one, and I said I didn't know; and Mr. Mayer suggested Salonka, who had always been fair and a good accountant. McHugh thought that a good idea at the time, but afterwards, he didn't think so and took them away from Mr. Salonka.

Q. Well, Salonka did give you an auditor's report?  
A. Yes, sir.

Q. Showing you one dated August 31, 1949, did he make that up for you and Mr. Mayer, at your request?

A. Well, I don't know whether or not this is the one that was made up in the case of Murray vs. McHugh Trucking Company, where we were sued—Mayer and I—and at the time, for the purpose of that suit, we requested a statement from Mr. Salonka. [48]

Q. Well, now, who furnished Salonka with the information contained in this statement?

A. This all came from the books.

Q. Came from the books of the concern?

A. Yes, sir.

Q. And you offered an exhibit like that in the case that you mentioned having been brought by Mr. Murray? You furnished the court with a statement similar to this one?  
A. I believe so.

Mr. Simmons: I think that is the one. It is the only one I have ever seen.

(Testimony of R. D. Tembreull.)

Mr. Anderson: I will put it in evidence.

Mr. Simmons: I might state for the Court that we were resisting an application for a receivership on this company in the superior court at that time.

The Referee: What date was that?

Mr. Simmons: It is about the date of this report, and the report is dated August 31, 1949, so it would be in the neighborhood of that date—maybe the 1st of September, or shortly after Labor Day. But at that time, the application was made by J. W. Murray for the appointment of a general receiver, and we were attempting to avoid the appointment of a receiver at Murray's behest; it being our theory that it was a joint venture, so [49] to speak, and he had no right to the appointment of a receiver thereof, and if he did have the right, it would be only on the specific truck in which he had an interest.

That matter was heard before Judge James, who had taken it under advisement, and after the briefs had been submitted, as I recall, ruled against a general receiver, but required us to hire a receiver to manage and operate the one truck in which Mr. Murray had an interest. Mr. Murray's counsel declined to proceed on this basis, and the matter has stood that way ever since, until the superior court receives the referee's report where a complete accounting had been made to Mr. Murray of the trips which the truck made—the truck in which he had the interest, and if funds were now due to Murray under the agreement, that have not been disposed

(Testimony of R. D. Tembreull.)

of—that matter is being handled by Mr. Derrig, the referee.

The Referee: Mr. William Derrig?

Mr. Simmons: An accountant named Derrig.

Mr. Anderson: I will offer the statement as Exhibit 5, an auditor's report.

The Referee: Trustee's 5. It will be received.

(Whereupon the document above referred to was marked for identification as Trustee's Exhibit 5, and received in evidence.) [50]

Q. (By Mr. Anderson): Did you ever drive a truck—any truck—for the company?

A. I never drove truck for the company.

Q. Never made any deliveries? A. No.

Q. Your name has appeared on any payroll?

A. No, I wasn't on the payroll. I wasn't on salary.

Q. You weren't on the payroll?

A. No, I received no salary.

Q. You did receive a number of checks from the concern? A. Yes.

Q. What were they given you for?

A. For loans to the company.

Q. All of them?

A. Some were for expenses, such as when McHugh requested us to come down to Yakima to offer our advice, for what it was worth.

Q. I didn't hear that?

A. Like gas and oil expense on trips when we would go down to Yakima to consult with him. He

(Testimony of R. D. Tembreull.)

was trying to show us where the company was making good money, but he always needed more money to pour into it.

Q. Some of these checks were in payment of your expenses in traveling over to Yakima?

A. Yes, he said if we would come down to consult with him, [51] the company would pay our expenses.

Q. He didn't pay them?

Mr. Simmons: You paid them.

A. Well, he authorized them.

Q. (By Mr. Anderson): You didn't need his authorization to get the money?

A. Well, he was running the company, and if he didn't authorize it, he would have raised the roof.

Q. All you had to do was to write a check?

A. Yes, but he would hear about it.

Q. He couldn't withdraw any money from this bank account—this man McHugh?

Mr. Simmons: Which bank are you talking about?

A. Well, McHugh took the account to three different banks at different times. There was this one in the Main Branch, Seattle First National Bank; there was one in the Yakima Valley Branch of the Seattle First National Bank; and there was one of them, I believe, in the Westside Bank in Yakima.

On the account at the Main Branch, Seattle First National Bank, the account was started by Mayer and myself so that McHugh—well, the agreement was that when he would be gone, the driver or some-

(Testimony of R. D. Tembreull.)

one would call up from Yakima and say there is something coming due, and he is down at Los Angeles, and it should be paid. [52] He was on the road at different times, and when he moved over to Yakima that account was opened up down there—McHugh opened that one up, and it still required the three signatures—no, he started that without the three signatures so that if he was out of town, drumming up business—he run over eight states, he could call us up and have us issue the check for something that needed to be paid, or the driver would come in and tell us. However, that didn't apply with the new account when he moved the account to the Westside Bank. He was the only one who could sign that.

Q. Now, when you went to get equipment so that this concern could operate, did you and Mr. Mayer pick out this particular equipment?

A. McHugh was the one who passed on what equipment should be bought.

Q. Did you and Mr. Mayer go out with him to pick the stuff out?

A. Sometimes we were with him, but he was the one who had the final O.K. on what truck equipment was needed.

Q. He being a trucking man would, for example, would advise that this truck would be a good buy, but he would consult with you and Mayer before he bought it?

A. The only reason he called was the reason there wasn't enough money. [53]



(Testimony of R. D. Tembreull.)

Q. When you bought the '48 Federal, all three of you were there and you said among yourselves, "Let's take it"?

A. No, this is one he wanted. He said, "I can get a lot of business for it, with the flat bed like this, and I can make these trips and I will drive it myself, if you will put up the money."

Q. You looked the truck over before buying it?

A. I looked at it, the same as I would look at a car, but I don't know anything about them, so that any advice I would give wouldn't be worth much.

Q. Who bought the truck and trailer from the Philippine Produce Company at Wapato? Did you look at it?

A. Seems to me I saw it during the course of the negotiations. McHugh contacted us quite a few times before I ever saw it, or went down there. However, the Philippine Produce Company—I forget, is that the right name—anyhow, they, offhand, refused to do anything and we were so advised by McHugh; and a fellow by the name of R. Baldon, I think it was, he wouldn't sell to McHugh Trucking company, but if we personally indorsed the deal, then he would.

Mr. Anderson: That is all.

#### Cross-Examination

Q. (By Mr. Simmons): If the Court is through with the files, I think it [54] might be enlightening to go into the history of these trucks. What was the first truck, Mr. Tembreull?

(Testimony of R. D. Tembreull.)

A. The Federal, the same one we are talking about.

Q. Where did you get the Federal truck?

A. From Eckert Automotive.

Q. Who negotiated the purchase?

A. McHugh, mainly.

Q. And the next one—which one was that?

A. That was the Reo.

Q. Where did you get the Reo?

A. I don't remember, offhand, the name of the company—it was the company at 14th and Marion. It was some friend of McHugh, that he had done business with for quite some time, a Jewish fellow, and I think he is since dead.

Q. What was the third truck you bought?

A. That was a Peterbilt.

Q. Where did you get the Peterbilt?

A. I think that was Eckert. We were down there, I know, talking to somebody about it.

Q. And the other truck?

A. That was a '44 tractor—a Peterbilt—that was Murray's truck.

Q. That was by the arrangement as outlined before?

A. Yes, and also No. 2—with Davis, under the same arrangement as the Murray truck. [55]

Q. Did you have a further truck?

A. No. 5 was the International—the Philippine Produce Company truck.

Q. Was that bought under conditional sales contract—the Philippine Produce Company truck?

(Testimony of R. D. Tembreull.)

A. Yes, sir.

Q. In each instance, McHugh initiated the purchase?

A. Yes, with, I believe, one exception, the answer should be definitely, yes. The first one—Murray happened to be my partner in some work at the time—not my business partner—but he asked me one day how I would like to have another truck. I told him I didn't have anything to do about it, but what was the score? So he told me that he and his wife—if they put up some money to put on a truck, could they share in the profits? I said I didn't know, but I will tell McHugh.

Mr. McHugh was driving taxicab at the time, and quite often he would come down there to our district and Murray would ride around in the back of the car, McHugh explaining things to Murray, and finally Murray put up the money.

Q. Did you ever hire or fire anybody working for this company?           A. No.

Q. Who did the hiring? [56]

A. McHugh.

Q. Did you tell him, or did you direct what companies they would haul for, or where the trucks would go?

A. No, McHugh would get the loads. He would designate where the loads would go and tell the drivers what to do.

Q. As I understand it, your expected income was from hauling payloads of merchandise or produce, and getting the revenue for it?

(Testimony of R. D. Tembreull.)

A. Yes, sir.

Q. The Court asked Mr. Mayer about this indebtedness. Were you and Mr. Mayer claiming in the petition, an equal amount of indebtedness from the copartnership? And are you able to itemize that indebtedness?

A. Some of it I can, offhand; but the rest of it, I can't unless I get together with the auditor.

Q. But you will get that for the Court?

A. Yes, I could tell some of it right now.

Q. All right, go ahead.

A. I remember McHugh saying, "We are going into the winter months and we have got open trailers, and we want closed trailers." He knew a party down in Portland who had a trailer for \$3500, and we borrowed the money from the First National Bank—Seattle First National.

A. In whose name?

A. Mayer and Tembreull only, personally. And that money [57] was used to pay cash down for the trailer.

Q. How much? The whole \$3500.

A. Yes. There was another time—I forget the name of the insurance company, offhand, but they kept after McHugh and they were going to cancel the insurance, and the Seattle First National Bank said those trucks had to be covered.

Q. There were still payments coming due?

A. Yes, and they came after us personally, and we told McHugh, and he said, "well, those trucks have got to roll", and he said, "if we had a little bit

(Testimony of R. D. Tembreull.)

more money", so we went to the bank and borrowed \$2,000 and paid the insurance.

The Referee: You mean, McHugh?

The Witness: Mayer and I, personally.

The Referee: McHugh didn't borrow?

The Witness: They wouldn't let him; and the rest, it was paid out for the expenses of McHugh Trucking Company.

The Referee: They would loan the money and you would pay it out as required?

The Witness: Yes. There were other items that were advanced from time to time to the company when it ran short of money, on the promise of McHugh that there was more business coming in, or that was to come in to [58] to the company, to help take care of the expenses.

The Referee: In other words, did you take this money and deposit it in the McHugh Trucking Company account in the Seattle First National Bank?

The Witness: Some of it, was, Your Honor.

The Referee: And then you drew it out?

The Witness: Yes, sir.

The Referee: Exhibit 4—are the checks by which you drew this money out?

The Witness: Yes, sir.

The Referee: Without counting them, each book has how many?

The Witness: Twenty-five, I believe, Your Honor, something like that. Some of them are just like when McHugh would call us up and say the driver has to have money, and you wouldn't want to issue the whole amount in one check, so we would

(Testimony of R. D. Tembreull.)

have to give him three, four or six \$25 checks.

The Referee: The drivers would contact you or Mr. Mayer before going on trips?

The Witness: Very seldom.

The Referee: I want to know, Mr. Tembreull, just what initiated the payment of these checks. From where did you get permission to pay out the money?

The Witness: Well, McHugh would tell us. [59]

The Referee: But he was over at Yakima.

The Witness: No, he was back and forth.

The Referee: Just tell me what happened, if you know.

The Witness: I don't understand.

The Referee: I want to know who initiated these payments.

The Witness: When we first started, McHugh wanted this checking account, opened, as he was going to be off on the road—back and forth, and he wanted it so that he could call us and have the checks made out. In the beginning, the invoices and bills went to 552—I have forgotten the street—to McHugh's home. Then, when he moved to Yakima—

The Referee: When was that?

The Witness: I don't remember, offhand, but it was when the fruit season was supposed to start. Sometime in August—the latter part of 1948—and for the same reason, he would either be off making a trip and he wanted those bills able to be paid, and that is the reason he would come in. He wanted checks issued for gas and oil and for expenses, to be used on trips down to Los Angeles, by him or one of the other drivers.

(Testimony of R. D. Tembreull.)

The Referee: But these checks issued to drivers, and I suppose, to people supplying you with materials— [60] I haven't checked them, but there seems to be a considerable amount of them—indicates that they were general expenses of the McHugh Trucking Company?

The Witness: Yes, sir.

The Referee: I still don't know from whom you got the authority to pay out these checks——

The Witness: Nobody else gave the orders—McHugh was the only one who directed the policy of the company.

The Referee: But you took the responsibility to pay out the money on the checks, yourself?

The Witness: Well, I would know what bills were due, and he would leave instructions to pay them.

The Referee: I am not clear on this. In the beginning, the invoices and bills went to McHugh's home at 552 some street or other in Seattle, and after that?

The Witness: Then, as long as he was going to be on the road and his wife was living at a hotel—the Don Lee, and before that they lived in an auto court and moved into the Don Lee Hotel, and he would be back and forth on the road—as long as his wife would be alone there, all the mail was arranged to come to 626——

The Referee: Where is 626?

The Witness: At 13th Ave. North. That is where Mr. Mayer and I live.

(Testimony of R. D. Tembreull.)

The Referee: How long did the mail come there?

The Witness: Until McHugh got established so that he had a permanent residence at the hotel.

The Referee: Did you get mail at your home address for the company?

The Witness: That is where it did come.

The Referee: To your home, Mr. Tembreull?

The Witness: Yes, temporarily.

The Referee: Well, that is all the headquarters you had at the time?

The Witness: Yes, sir.

The Referee: And that was between September, 1948, and April of 1949?

The Witness: No, I don't think it came quite that long, Your Honor.

The Referee: Well, when?

The Witness: That came off and on; there would be one come and it would all be forwarded to McHugh.

The Referee: Then when an invoice would come in for a shipment of supplies, you would send a check?

The Witness: If it had McHugh's O.K. on it.

The Referee: If you knew about it, you would pay?

The Witness: That is right, but if it didn't have McHugh's O.K. on it, I would wait until I got his O.K. to do so.

The Referee: That is all. [62]

Mr. Simmons: I have nothing further.

(Witness excused.)



JAMES E. McHUGH

being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Anderson): Will you give your full name?      A. James E. McHugh.

Q. And your residence?

A. Yakima, Washington.

Q. You operated this business known as McHugh Trucking Company?      A. Yes, sir.

Q. This equipment you used in the operation of it—did you buy that yourself, or did you, Mayer and Tembreull look it up, discuss it, and buy it?

A. We looked at it together; then bought it.

Q. Now, who deposited all the money in the Seattle bank?

A. Mr. Mayer and Mr. Tembreull.

Q. Did you deposit any?      A. No.

Q. Did you check out any?      A. No.

Q. You had a bank account at Yakima?

A. Yes, sir. [63]

Q. You deposited money in that?

A. What deposits there were.

Q. And you checked it out?

A. Well, the three of us wrote checks there.

Q. The three of you?      A. Yes, sir.

Q. And if two names appeared on a check, it was a good check, Mr. McHugh?

A. No, in Yakima you only had to have one signature.

Q. Only had to have one?      A. Yes, sir.

(Testimony of James E. McHugh.)

Q. Did Mr. Mayer or Mr. Tembreull ever dig up any business for this concern?

A. Oh, yes, some.

Q. Did they dig it up in Yakima, Seattle, or where? A. No, not in Yakima—in Seattle.

Q. Did they solicit orders and obtain orders for delivery of merchandise?

A. Yes, they talked to customers a few times, but very seldom.

Q. Who fired the employees?

A. Well, I did, most of the time. I think on one occasion Mr. Mayer did tell me to.

Q. Some of the time did Mr. Mayer hire?

A. No, he would suggest someone, but I don't think he ever [64] hired anyone.

Q. And when it came to firing someone?

A. It was the same thing.

Q. Either one of these two men—

A. If there was someone didn't do the work properly, they would say, "let him go" and we did.

Q. The only truck remaining on hand is a certain International Truck and trailer?

A. Yes, sir.

Q. Aren't the wheels on that truck and trailer?

A. Yes, sir.

Q. Well, when did they get on it? Did you have the wheels brought over—

A. The other wheels, we had to put some on it.

Q. I was over there in December and I saw the truck and trailer. Were the wheels on the truck and trailer last December?

(Testimony of James E. McHugh.)

A. Just enough to move it, yes.

Q. Well, where are the wheels that are missing?

A. There are some down at Sarber Tire.

Q. How many?

A. There were three down there.

Q. Where is that place?

A. First South and Yakima.

Q. And are the tires on the wheels? [65]

A. Yes, sir.

Q. Are those the tires on the trailer, or on the truck?

A. There is two missing on the truck and four missing on the trailer—six tires.

Q. There are three down at one place?

A. And three over at Richardson Tire Company.

Q. What is that address?

A. I don't know the exact address.

Q. Is that a garage or a service station?

A. That is a tire company.

Q. Are all parts of the engine there at Fairchild's?

A. Yes, we had the truck torn down to do some overhaul on it when it was tied up in this litigation, and the parts were taken into the garage, and after it was released, as I hear, the parts were put back in the van and they were still there when it was moved over to Redmon-Fairchild.

Q. This matter of the accountant, Salonka. Did you hire him?

A. I didn't. He was the second accountant; the first accountant was hired—

(Testimony of James E. McHugh.)

Q. Who hired the first accountant?

A. Mayer and Robert. Robertson—he sued us to get his money shortly afterward.

Q. Did you know the man before he went to work for you? [66]

A. Never met the man, at no time.

Q. How did you meet the man?

A. After Tembreull and Mayer hired him.

Q. You never met him before, at all?

A. No.

Q. How about legal services—who was attorney for this company?

A. Well, Mr. Simmons was attorney for Mayer and Tembreull, and Mr. Beardsley was my own attorney. That is, when we organized the company.

Q. Well, before this matter came up, did you ever do any business with Mr. Simmons?

A. No.

Q. Who took you to his office?

A. Mr. Mayer and Mr. Tembreull.

Q. Did you ever do any business with Karl Heideman?      A. I don't believe so.

Q. You don't know him?

A. I had Karl Heideman years ago, but for this company, I never did.

Mr. Anderson: I think that is all.

#### Cross Examination

Q. (By Mr. Simmons): Didn't you have a lawyer in Yakima for this company?

A. Yes, Mr. Splawn. [67]

(Testimony of James E. McHugh.)

Q. At the time Mayer and Tembreull were about to put their money into this venture, they asked that certain papers be prepared by me, or by my office?

A. I believe so.

Q. And you, at that time, were represented by Bill Beardsley?           A. By Mr. Beardsley, yes.

Q. When this application for receivership came up, wasn't it agreed that I represent the company at that hearing? The hearing when Murray sued for receivership?           A. Yes.

Q. And at the time when the company's accounts were all tied up, or garnisheed, didn't you come to my office to see if I couldn't help you out?

A. Yes, I did.

Q. And they had sued to garnishee the company's money?           A. Yes, sir.

Q. And I spent a great deal of time ironing that out, for the benefit of the three of you, and the company, too?           A. That is right.

Q. Well, now, at the time somebody by the name of Whitey sued you to try to sell the permit of the company, was it your notion I should represent you at that time, and save those permits?

A. I don't think that was me—I was in California at that time that took place, because when I came back, I [68] inquired.

Q. Well, did you desire to hire somebody else?

A. I don't recall that at all. I know we had some papers——

Q. The papers were served at Yakima and you had them forwarded to me?

(Testimony of James E. McHugh.)

A. That was here in Seattle that it first started. I may be wrong, but I think so.

Q. I had to take the matter up with the authorities at Olympia to preserve the permits, which were in your name. Now, when this started, all you had were the permits?      A. That is right.

Q. That is all you ever put into the company?

A. I wouldn't say that, as I put in a lot of time, too.

Q. Well, you invested no dollars and cents?

A. No, not at all.

Q. But you had these permits which you thought could be profitably used if you could get financed?

A. Yes, sir.

Q. You sought out Mayer and Tembreull to see if they wouldn't finance you?

A. They sought out me—it was vice-versa here.

Q. Did you, or did you not desire to utilize the permits which you held?

A. I didn't for two years. I wasn't in a big hurry to go back in, until I met Tembreull through some friend, and [69] he happened to ask if I had a company on Dearborn St., and I said, "Yes". Then he said did I know a man by the name of Al Mayer, who used to do a lot of some kind of work—I forget what it was—and he said, "Al is my partner". And the next night, or very shortly after, I dropped over to see Mr. Mayer, because I hadn't heard of him for a couple of years.

Mr. Nelson: Is this material?

The Referee: I don't see that it is material, but if Mr. Simmons——

(Testimony of James E. McHugh.)

Q. (By Mr. Simmons): Your relations were very friendly?

A. Yes. We had a dispute towards the last about a bill that was never paid; he claimed some other contractor ordered it and he never did get it, but we never had no trouble over it.

Q. When you went to see him, did you see if he was interested in helping you to get started again?

A. Mr. Tembreull suggested that in our first conversation—that if I had the permits, they would finance me with the permit, if I didn't have it in use.

Q. That is how this thing originated?

A. Yes, sir.

Q. You entered into a limited partnership? You were to be the general partner and manage the truck company?

A. That is right, but I can't see it ran that way. [70]

Q. From time to time, as a matter of practice, the \$3000 these men put in proved to be very inadequate—very insufficient?

A. There was a couple of times, and the insurance was inadequate, but a lot of this I don't understand, that was added into the company as we went along.

Mr. Simmons: I think that is all.

### Redirect Examination

Q. (By Mr. Anderson): Let me ask you, Mr. McHugh, what are you doing now?

(Testimony of James E. McHugh.)

A. Well, I am working extra board for United Freight Lines.

Q. Do you have any truck operations?

A. I have one, operating for myself.

The Referee: I think that is immaterial in this hearing.

Mr. Anderson: I don't think so, in this hearing.

The Referee: Was any substantial part of these debts which are in the schedule of McHugh Trucking Company, incurred before April of 1949?

The Witness: I am sure I can't answer that.

The Referee: To what extent did Mr. Mayer and Mr. Tembreull enter into the management of the company before April, 1949?

The Witness: Well, in buying various parts we had to buy, such as tarps and chains—they were bought just [71] wherever they wanted to buy them; and then, the insurance—that was one of the items. I have an insurance agent by the name of Chester Forshee to keep the insurance alive—I had Forshee as my agent, and they had an agent by the name of Dobson, or something like that, and he handled our insurance, which was very costly on a long haul basis.

The Referee: At whose specific request, if any, did they make those payments by check out of the account in the Seattle First National Bank?

The Witness: I didn't get that.

The Referee: By whose request, if any, did they make those payments by check out of the Seattle First National Bank? They made a number of pay-



(Testimony of James E. McHugh.)

ments on behalf of the company out of the Seattle First National?

The Witness: Yes, sir.

The Referee: How was that initiated?

The Witness: Well, just whatever they wanted to pay—whenever there was a payment or some certain bill—they paid it.

The Referee: On their own initiative?

The Witness: Yes, sir.

The Referee: Was there any change in their participation in the management as of April 20, 1949?

The Witness: Well, they took one truck out from [72] under me, out from Yakima while I was in Salt Lake City, soliciting business.

Mr. Simmons: I will object to that, as not responsive to the question.

The Referee: During the time you were soliciting some business, what happened to the truck?

The Witness: They leased it out.

The Referee: To whom?

The Witness: To Exley, in Portland, and it was a matter of about six weeks or two months before I got the truck back in our own business. We were paying 10% for state loads and when we had our own loads out of Yakima. And they collected the money in Portland. I waited here in Seattle while they drove to Portland to collect the money and they deposited it in their bank and I never did see the money.

The Referee: About when was that?

(Testimony of James E. McHugh.)

The Witness: January, February and March of 1949.

The Referee: That is all I have.

### Redirect Examination

A. (By Mr. Clemans): Mr. McHugh, concerning the approval of the bills to be paid by check, what was the arrangement for their approval? You have heard Mr. Mayer and Mr. Tembreull say you approved them? [73]

A. I didn't approve them. If there was a bill, if the money was in the bank, they would go ahead and make the payment.

Q. Who would contract for the bills?

A. Well, at Seattle First National, it was the three of us.

Q. No, suppose they made out a check to a supplier for gas or something like that, would that be something you would contract for?

A. No, some of these bills were service stations, and a few others. I never had anything to do with them.

Q. How about routing of trucks, and loading and pickup of loads by drivers?

A. I had charge at Yakima. They would ask me where is my next trip, or what to do next.

Q. Mr. Tembreull stated on some occasions he would get expense money for going to Yakima to converse with you concerning policy. What were those matters?

A. Oh, two or three times a week, he used to fly over by Northwest Airlines—at various times.

(Testimony of James E. McHugh.)

Q. According to the check book, he wrote an expense check on the hotel?

A. Well, that was on an airline trip.

Q. When they gave money, or put money into the company, did they turn it over to your control?

A. I didn't get it.

Q. I will ask you, did they put \$22,000 into the company, in your opinion?

Mr. Simmons: Object to the question as wholly immaterial.

Q. (By Mr. Clemans): Do you know if they put in \$22,000? A. No.

Q. When they put money into the company were there any strings on it, or did they give it to you to handle in your way?

A. It was put in the Seattle First National Bank, where they could write checks.

Q. Could you write checks? A. No.

Q. Did you ever ask to write checks?

A. No.

Q. Why were you not authorized to write checks?

A. It never made much difference. The three of us were in it, and if they wanted to handle the money it was perfectly all right with me. They could handle it as well as I could. At Yakima—they would send checks over from this bank for me to deposit over there.

Mr. Clemans: That is all.

The Referee: That is all. You are excused.

(Witness excused.) [75]

MELVIN MOSS

being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Anderson): Will you state your name, please? A. Melvin Moss.

Q. Where do you live? A. Wapato.

Q. Were you a driver connected with this McHugh Trucking Company? A. Yes, sir.

Q. When did you first become connected with the McHugh Trucking Company?

A. When they bought the International Truck from the Philippine Produce Company.

Q. Who asked you to drive for McHugh Trucking Company?

A. It was either Mr. Mayer or Mr. Tembreull asked me when I was on the truck. I don't remember which one of them it was asked me to go to work.

Q. It was agreed you would drive the truck afterwards? A. Yes.

Q. To what extent—how much volume—did they order and direct you to carry on?

A. Mr. McHugh was out of town and they would come over and say to go here and go there. You see, we were hauling [76] into Idaho and into Oregon—different places.

Q. Did they come over reasonably often?

A. Yes.

Q. Did you—or rather, would you have any knowledge of either Mr. Mayer or Mr. Tembreull getting business for delivery?

(Testimony of Melvin Moss.)

A. Well, they would go to Pacific Fruit at Yakima when McHugh was out of town, and contact them for loads.

Q. They would get orders for delivery from Pacific Fruit?           A. Yes.

Q. Anybody else?

A. Not to my knowledge.

Q. When McHugh was out, he would be driving different trucks to Salt Lake City and other points?

A. Yes.

Mr. Anderson: That is all.

#### Cross Examination

Q. (By Mr. Simmons): Do you know whether or not Mayer or Tembreull, either of them, were given instructions by McHugh to do the things you say they did?           A. I don't get that.

Q. Do you know whether or not McHugh gave them instructions to do what you said they did?

A. No. [77]

Q. Do you know whether or not they had any instructions from McHugh to tell you what to do?

A. No.

Q. You don't know that?           A. No.

Q. Do you know how the company happened to be hauling from Pacific Fruit?

A. No, they was hauling for them when I went to work there.

Q. As a matter of fact, that was McHugh's account?           A. That I don't know.

Q. Their headquarters were at Seattle?

(Testimony of Melvin Moss.)

A. Right—whose headquarters were at Seattle?

Q. Pacific Fruit Company.

A. Yes, but it wasn't coming out of Seattle.

Q. I asked if you knew where their headquarters were?     A. Yes, Seattle.

Mr. Simmons: I think that is all.

The Referee: You may step down.

(Witness excused.)

Mr. Nelson: I think that is all, for the trustee, at least.

Mr. Simmons: We have nothing further to offer.

The Referee: I will hear from you, Mr. Simmons.

Thereupon, after oral argument by Messrs. Simmons, counsel for Albert A. Mayer and R. D. Tembreull, and [78] Anderson, counsel for Trustee William Steinert, the Referee stated as follows:

The Referee: I will enter a formal order for them to file schedules.

(Thereupon, the hearing was concluded at 5:40 o'clock p.m., January 12, 1951.) [79]

[Endorsed]: Filed February 28, 1951.

[Endorsed]: No. 13,215. United States Court of Appeals for the Ninth Circuit. Albert A. Mayer and R. D. Tembreull, Appellants, vs. William J. Steinert, Trustee in Bankruptcy of McHugh Trucking Company, a limited partnership, and James E. McHugh, General Partner, bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed December 28, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 13,215

ALBERT A. MAYER and R. D. TEMBREULL,  
Appellants,

vs.

WILLIAM J. STEINERT, Trustee in Bankruptcy  
of McHugh Trucking Company, a limited part-  
nership, and James E. McHugh, General Part-  
ner, bankrupt,

Appellee.

STIPULATION AS TO CLAIM OF  
CREDITORS

It is hereby stipulated by and between J. Lael Simmons and Nelson R. Anderson, counsel for the parties herein, that there are on file with the referee in bankruptcy creditors claims against the McHugh Trucking Company which well exceed five hundred dollars (\$500.00) after deducting therefrom the value of all the assets of both the firm and of James McHugh, general partner, which are available in satisfaction of said creditors claims.

/s/ J. LAEL SIMMONS,  
Attorney for Appellants.

/s/ NELSON R. ANDERSON,  
Attorney for Trustee.

[Endorsed]: Filed Jan. 11, 1952. Paul P. O'Brien,  
Clerk.



[Title of U. S. Court of Appeals and Cause.]

POINTS ON WHICH APPELLANTS  
RELY

Appellants hereby set forth a statement of the points on which they intend to rely on the appeal of the above-entitled cause, to-wit:

I.

The referee in bankruptcy was without authority and lacked jurisdiction to enter an order adjudging appellants to be general partners in the firm of McHugh Trucking Company and directing them to file bankruptcy schedules.

II.

The referee in bankruptcy misconstrued the law when he found appellants to be general partners in the firm of McHugh Trucking Company.

III.

The District Court erred in refusing to vacate the adjudication and dismiss the petition in bankruptcy against the McHugh Trucking Company upon application of appellants after affirming the order of the referee which held that appellants were general partners in McHugh Trucking Company.

/s/ J. LAEL SIMMONS,  
Attorney for Appellants.

[Endorsed]: Filed Jan. 11, 1952. Paul P. O'Brien,  
Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF RECORD  
TO BE PRINTED

Pursuant to Rule 19 (6) of the rules of practice of this court, appellants in the above-entitled cause hereby designate the portions of the record, proceedings and the exhibits to be printed and contained in the record on review, as follows:

1. Creditor's Petition (including Exhibit A attached thereto).
2. Answer to Creditor's Petition.
3. Adjudication of Bankruptcy.
4. Order of Reference.
5. Oral Decision by District Court (pages one and two and page three down to and including line 21).
6. Special appearance by appellants.
7. Referee's Certificate on Review.
8. Trustee's Petition.
9. Order for Examination of Bankrupt and Order to Show Cause.
10. Order Directing Albert Mayer and R. D. Tembreull to file Bankruptcy Schedules.
11. Petition for Review (do not print Exhibit A thereto attached).
12. Transcript of Hearing on Order to Show Cause.
13. Order by District Court Affirming Referee's Determination.
14. Order of District Court Reaffirming Original Order with Leave to Attack Petition.
15. Cost Bond on Appeal.

16. Notice of Appeal.
17. Order Denying Motion to Dismiss.
18. Memorandum Opinion.
19. Notice of Appeal.
20. Stipulation and Order Extending Time for filing Record on Appeal.
21. Statement of Points on Which Appellants Rely.
22. Stipulation as to Claims of Creditors.
23. This Designation.

/s/ J. LAEL SIMMONS,  
Attorney for Appellants.

[Endorsed]: Filed Jan. 11, 1952. Paul P. O'Brien,  
Clerk.

